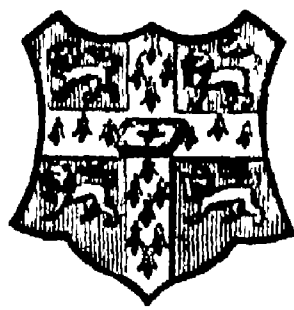






THE COMMENTARIES OF  
*GAIUS*





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# THE COMMENTARIES OF GAIUS

*TRANSLATED WITH NOTES BY*

J. T. ABDY, LL.D.

REGIUS PROFESSOR OF LAWS IN THE UNIVERSITY OF CAMBRIDGE,

AND

BARRISTER AT LAW OF THE NORFOLK CIRCUIT:

FORMERLY FELLOW OF TRINITY HALL;

AND

BRYAN WALKER, M.A., M.L.

FELLOW AND LECTURER OF CORPUS CHRISTI COLLEGE,

AND LAW LECTURER OF ST JOHN'S COLLEGE, CAMBRIDGE;

FORMERLY LAW STUDENT OF TRINITY HALL AND

CHANCELLOR'S LEGAL MEDALLIST

*Dixi saepius post scripta geometrarum nihil exstare quod vi ac subtilitate cum Romanorum jureconsultorum scriptis comparari possit, tantum nervi inest, tantum profunditatis.*

LEIBNITZ.

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very narrow limits. Its excellencies, literary and juridical, have been judged of from one work alone ; and whilst the whole range of classical writers has been eagerly travelled over by the teacher and the student, the author and the reader, the style, the language, and the logic of some of Rome's greatest thinkers and ablest administrators have been utterly neglected, or at best noticed in vague and careless reference. If in addition to the *Institutes* of Justinian the reviving taste for Roman jurisprudence shall promote a closer and more careful study of the language and thought of the old jurisconsults, as exhibited in the books of the Digest, it may confidently be predicted that in every department of knowledge will the student of imperial Rome be a gainer ; that our store of information as to her manners and customs, her legislation, the private life of her citizens, and, last though not least, her language itself, will be largely increased.

The University of Cambridge has, however, wisely confined the attention of its law students for the present to the great work of Gaius, (a translation of which is now offered to the public,) and to the *Institutes* of Justinian, so far as an acquaintance with the original language of the legal sources is concerned. *For the present* we say, because it is to be hoped that the Digest itself may after a while be recognized as a fit subject for the student's preparation, when with increased facilities an increased taste for the *fontes ipsissimi juris* has been engendered ; and that excerpts of its most practical parts may be made hereafter to constitute a portion of his legal course. Indeed there seems no reason to doubt that far more extensive use will in time be made of the sources of Roman law, and that Ulpian, Gaius, and others of the ante-Justinianean compilers of legal histories and legal forms, will be as much recognized as forming a part of Roman Law study as the *Institutes* of Justinian have been and are.

On Gaius himself, his name, his country, the works he composed, his position amongst the lawyers of Rome, his fame in later times, the story of the loss and wonderful recovery of his Commentaries, and the influence of that work on the treatise of Justinian, there is no need to dilate. All that can be told the reader on these and other points in connection with his life

and writings is so fully and ably narrated in the *Dictionary of Greek and Roman Biography* by Dr Smith, that it is sufficient to refer him to it. There are, however, one or two matters deserving of more particular attention.

In the first place, as regards Gaius himself, it is important to remember that whatever reputation he acquired in later days, and however enduring has been his fame as the model for all systematic treatise-writers on law, in his own time he was only a private lecturer. Unlike many of the distinguished lawyers who preceded him, and others equally distinguished who were his contemporaries, he never had the privilege *condendi jura, in jure respondendi*. That he was a writer held in eminent distinction in Justinian's time is clear from the large number of extracts from his works to be found in the Digest<sup>1</sup>, and there is good reason to believe that he was a successful and popular lecturer; but it is strange that with all his rare knowledge and laborious research he did not emerge from his comparative obscurity. It may be that the very learning for which he was pre-eminent unfitted him for public life. His love of investigation, his strong liking for classification and arrangement, and his studious habits, possibly gave him a distaste for a form of practice in which all these qualities are of much less importance than rapidity of judgment, prompt decision, and aptness for argumentative disputation. He was one of those men like our own Austin; lawyers admirably fitted for the quiet thought and learned meditation of the study, but averse from the stir and bustle of the forum; but not the less valuable members of the profession which they silently adorn.

A comparison of the excerpts from the writings of Gaius in the Digest with those from Ulpian, Paulus, Papirian, and others, to whom was granted the privilege of uttering *responsa*, will show that there is in Gaius, as his Commentaries also evince, an

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<sup>1</sup> A catalogue of these *excerpta* will be found in the article above mentioned in the *Dictionary of Greek and Roman Biography*. The *Index Florentinus* merely gives the titles of the books composed by Gaius. The number of passages from these

quoted in the Digest, of which there are as many as 535, is laboriously stated in the *Jurisprudentia Restituta* of Abraham Wieling, pp. 7—20, and the *Palingenesia* of C. F. Hommel, Vol. 1. pp. 55—126.

unreadiness to give his own opinion upon contested questions, a strong inclination to collect and put side by side the views of opposite schools, and a constant anxiety to treat a legal doctrine from an historical rather than a judicial point of view. In Ulpian and Paulus, and men of that stamp, we meet with decisive and pithy opinions upon legal difficulties, an abundant proof of firm self-reliance and indifference to opposite views. and a lawyer-like way of looking at a doctrine as it affects the case before them, rather than accounting for its appearance as a problem of Jurisprudence or Legislature; with them it is the matter itself which is of primary importance, with Gaius it is the clearing up of everything connected with the full understanding in the abstract of the subject on which he is engaged. To this peculiar turn of his mind we are probably indebted for his keen appreciation of the help which history affords to law, and for the large amount of reference to archaic forms and ceremonies which proceeds from his pen.

From Gaius himself the transition to his Commentaries is natural. Three or four topics present themselves for notice upon that head: (1) Their nature and object; (2) the effect upon them of certain constitutional reforms that had been and at the time of their publication were being carried out at Rome; (3) the mode in which they were first presented to the public.

1st. As to the nature and object of Gaius' Commentaries:—There is an opinion pretty commonly accepted as correct, that this volume was written like the corresponding work of Justinian for the express purpose of giving a general sketch of the rules and principles of the private law of Rome, and that it was intended to be a preliminary text-book for students. That this gives a very incorrect notion of the aim of Gaius and the nature of his work is clear, partly from a comparison of it with that which was intended to be a student's first book on law (viz. the *Institutes* of Justinian), and partly from the analysis of its subject-matter. What Gaius really had in view was, not the publication of a systematic treatise on private law, but the enunciation, in the shape of oral lectures, of matter that would be serviceable to those who were studying with a view to practice. The work itself, as we shall show presently, was not

directly prepared for publication, but was a republication in a collected form of lectures (the outline of which perhaps had been originally in writing and the filling-up by word of mouth,) when the cordial reception of the same by a limited class had suggested their being put into a form to benefit a wider circle of students. The contents of the book will bear out this view. Thus, in the first part, Gaius speaks of men as subjects of law, shews what rights they have, points out who are *personae* and who are not, who are under *potestas* and *manus*, who can act alone and who require some legal medium to render their acts valid. In fact, the main object of the whole of this first part is to render clear to his hearers how those who are of free birth stand, not only in relation to those who are not, but in relation to the law. Hence there is no attempt at explaining the nature of Law and Jurisprudence, no classification of the parts of Law, no aiming at philosophical arrangement and analysis, but a simple declaration of the Roman law as it affects its subjects, men, illustrated of course by historical as well as by technical references. Hence we understand why there is nothing in the shape of explanation of the rules relating to marriage, of the relative position of father and son, of patron and client, nothing of the learning about the *peculium*, or about the administration of the property of minors and wards. In short, this portion of the Commentaries might be styled the general Roman law of private civil rights, cleared from all rules connected with special relations. One special matter, however, is discussed with much attention and detail, viz. the position of the *Latini* in relation to private law; but of this anomaly we shall speak at more length presently.

So far for the first portion of the work:—The second is of the same nature, viz. a declaration of the general rules of law as affecting *Res*. Here the arrangement is as follows:—In the first place Gaius gives us certain divisions of *Res* drawn from their quality and specific nature; he then proceeds to explain the form and method of acquisition and transfer of separate individual *Res*, whether corporeal or incorporeal, prefacing his notes upon this part of his subject with a short account of the difference between *res Mancipi* and *res nec Mancipi*: from this

he goes on to describe the legal rules relating to inheritances and to acquisitions of *Res* in the aggregate (*per universitatem*), interspersing his subject with the law relating to legacies and *fideicommissa*; last come obligations, which are discussed as incorporeal things not capable of transfer by mancipation, *in jure cessio*, or tradition, but founded on and terminated by certain special causes. In this part of his work it is very important to bear in mind<sup>1</sup> that the reader is not to look for a detailed account of the force and effect of obligations, and of the specific relations existing between the parties to them by their creation and extinction, for upon these matters Gaius does not dwell. His chief aim here, as it was in the subject of inheritance, is to show how they began and how they were ended. Thus then this second part of the Commentaries may be entitled "The objects of Law, their gain and loss."

The third part of the Commentaries is entirely confined to the subject of actions. Here too if the book be compared with the parallel part of Justinian's Institutes a striking difference in their nature will be visible. Gaius's work is in every respect a book of practice: it considers actions as remedies for rights infringed; it discusses the history of the subject, because the actual forms of pleading in certain actions could not be explained without an examination into their early history; it dwells upon the various parts of the pleading with a care that is almost excessive; points out the necessity and importance of equitable remedies; in fact, goes into a very technical and very difficult subject in a way that would be uncalled for and out of place in a mere elementary treatise on law.

2nd. The influence of certain political changes then going on at Rome upon Gaius's treatise have now to be noticed. Even to an ordinary reader of the Commentaries two remarkable features in them are visible. One the elaborate attention bestowed on the relation of the *peregrini* to the existing legal institutions of Rome, the other the constant references to the effect of the establishment of the Praetorian courts, with their

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<sup>1</sup> We are indebted to Böcking's short but valuable *Adnotatio ad systematicas* for this analysis of the Commentaries, especially for the particular fact here adverted to.

equitable interpretations and fictions, upon the old Civil Law. A few words upon these two points will not be out of place. There is a chapter in Mr Merivale's able *History of the Romans under the Empire*, which is most deserving of consideration by the student of Gaius. It is the one in which he speaks of the events that marked the reign of the Emperor Antoninus Pius<sup>1</sup>. The historian there passes in review the political elements of Roman Society at that time. Among the phenomena most deserving of attention two are especially noticed, the position of the Provincials in the state and the extension of the franchise on the one hand, and the relation of the *Jus Civile* and the *Jus Gentium* on the other. On the former head the narrative treats first of the struggles of the foreigners to obtain a participation in the advantages of Quiritary proprietorship, next of the gradual extension of Latin rights, and afterwards of full Roman rights, till the latter were in the end enjoyed by all the free population of the Empire. One or two passages deserve quotation simply for the sake of their illustration of the proposition we shall maintain—that Gaius held it a leading object to illustrate that part of the law that had the highest interest for the practitioners of the day, viz. the legal rules and the method of procedure by which the transactions and suits of the *peregrini* were affected.

Mr Merivale tells us then “that great numbers had gained their footing as Roman Citizens by serving magistracies in the Latin towns, but the Roman rights to which they had attained were still so far incomplete that they had no power of deriving an untaxed inheritance from their parents. Hence the value of citizenship thus burdened and circumscribed was held in question by the Latins. Nerva and Trajan decreed that those *new citizens*, as they were designated, who thus came in, as it was called, *through Latium*, should be put on the same advantageous footing as the old and genuine class.” Again he says, “great anxiety seems to have been felt among large classes to obtain enrolment in the ranks of Rome.....Hadrian was besieged as closely as his predecessor. Antoninus Pius is

<sup>1</sup> Ch. LXVII.

celebrated on medals as a multiplier of citizens." From these facts we can draw the conclusion that a large portion of the most important and lucrative business for lawyers in Rome at the period when Gaius wrote consisted of suits in which the *Peregrini* were concerned, and therefore that a knowledge of the rules of law by which they were affected was of the highest value. Hence it is easy to account for the constant and close attention bestowed by Gaius upon the *Latinitas*, and upon all legal matters relating to it, throughout the Commentaries. •

It would, however, be impossible to deal with these topics apart from that very remarkable phenomenon that must catch the eye of every reader of Roman law, viz. the *Jus Gentium* and its influence upon the Praetorian Courts. Here again Mr Merivale must be our authority, for he has shewn most clearly how useless was the civil law of Rome in respect of questions between foreigners or between citizens and foreigners. He has described the anomalous relations of the *Jus Civile* and the *Jus Gentium* in the Flavian Era, and has drawn attention to the important position occupied by the Edict of the Praetor. To his narrative we can but refer, but the inference we would draw from that narrative is that the attraction and value of Gaius's work to its first readers lay precisely in the fact that upon all these points (points as we see of the highest value at that time to the practising lawyer), his rare knowledge of pleading and procedure and his nice appreciation of the value of equitable remedies made him an authority of the highest rank, and that these topics were never disregarded when an allusion to them or illustration from them was possible.

3rd. As to the shape in which the work of Gaius was first given to the world we have already intimated our opinion. It was not a systematic treatise composed and prepared for publication like the *Institutes* of Justinian, but a sketch of lectures to be delivered on the legal questions most discussed at the time, corrected and amplified afterwards by the lecturer's own recollections of his *vivâ voce* filling-up, or by reference to notes taken by some one of his auditors<sup>1</sup>.

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<sup>1</sup> After this conclusion had been satisfaction of finding their views come to by the Editors they had the borne out by an excellent monograph



That the Commentaries are not intended to be a brief Compendium is plain. In a Compendium every topic is touched upon, none treated at excessive length. Gaius, on the contrary, omits many subjects altogether, as *dos*, *peculium castrense*, the rules as to *testamenta inofficiosa* and the *quarta legitima* (although the cognate subjects of institution and disinheritance are amply discussed), all the *real* contracts except *mutuum*, the “innominate” contracts, quasi-contracts, and quasi-delicts, the rules as to the inheritance of child from mother or mother from child, &c. &c. Other topics he discusses at inordinate length; the subject of the *Latinitas* is explained fully twice, viz. in I. 22 et seqq. and again in III. 56 et seqq.; the description of *agnatio* in I. 156 is repeated almost word for word in III. 10, and with the very same illustrative examples; the circumstances under which the earnings of others accrue to us are catalogued in II. 86, and again in nearly the same phraseology in III. 163; so too there is a double discussion of the effect of the *Litis Contestatio*, first in III. 180, 181, secondly in IV. 106—108. Huschke, who assumes the Commentaries to have been from the beginning a systematic treatise, says that Gaius would not have investigated the same subject twice, nor have stayed the progress of the reader to recall him to what had been already described, unless he had allowed the earlier books to pass from his hands and so could not by reference to them discover that he was passing a second time over the same ground: and hence he frames a theory that the Commentaries were published in parts. “This hypothesis,” says Huschke, “explains why on many points there is a second notice fuller and more accurate than the first.”

But the second reference is not always more full and accurate than the first. Many proofs of this might be given, but we will only ask the reader to compare the passages II. 35—37 and III. 85—87, and say whether the latter adds anything to the knowledge imparted to us in the former. So also in other instances, as II. 58 and III. 201.

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published only a few months back by Dr Dernburg of Halle, of which they have since made free use. *Die Institutionen des Gaius, ein Collegienheft aus dem Jahre 161 nach Christi Geburt.* Halle, 1869.



The lecture-hypothesis explains this peculiarity far better. When a systematic treatise is composed, the author can simply refer his reader back on the occasion of an old topic cropping up again ; but in a lecture this is impossible, and to prevent a misconception or to guard against a defect of memory on the part of his audience the lecturer repeats his former statements even at the risk of being tedious. This too, if thoroughly acquainted with his subject, and if delivering a course of lectures old and familiar to him by constant repetition, he is almost certain to do, as Gaius has done, in a form identical even in its verbiage with the first enunciation.

Besides these obvious arguments for the view here adopted, Dr Dernburg brings forward others of a more refined and subtle complexion. The abundance of examples, a well-known device of a lecturer to maintain attention ; the commencement of a new subject with such examples rather than with a dry statement of a legal maxim : the introduction of sentences such as “*Nunc transeamus ad fideicommissa. Et prius de hereditatibus despiciamus,*” which serve excellently to give the auditor time to make his notes in a lecture-room, but are unnecessary and wearisome in a set treatise ; the repetition of an idea in a new wording for the same end of giving rest to the hearer, as in the description of the parts of a *formula* “all these parts are not found together, but some are found and some are not found,” &c. &c. ; the marked antitheses, such as “*heres sponsoris non tenetur, fidejussoris autem heres tenetur,*” the identity of phraseology rivetting attention when it proceeds from a speaker, the want of change being wearisome on the part of a writer ; all these circumstances are pressed into the service of his and our argument. Hence we may fairly assert that the nature of the commentaries is such as we affirmed it to be at starting.

But whatever be the irregularities and omissions arising from the character of the work, it must still rank high, not only as the first law-book, on which all other legal treatises have been based, but as possessing an intrinsic value of its own for the light it throws upon old features of Roman life and Roman customs, for its keen appreciation of the aid which History lends to Law and Legislation, and for its philological spirit.

To the lawyer desirous to know the detail of Roman practice the fourth book alone would be enough to render the volume priceless; to the classical student seeking to acquaint himself with the outline of Roman law for the better comprehension of the classical historians, orators and poets, Gaius is at once an author more agreeable to peruse, because his language although not of the golden, is still an admirable specimen of the silver age, and beyond all comparison superior to the utterly debased style of Justinian, and more valuable as an authority because his law is that of a period only a century and a half posterior to Cicero, whilst Justinian is separated from him by more than five hundred years.

We have now to touch upon a few points more intimately connected with the present translation.

The text relied upon is in the main that of Gneist, but in the fourth book frequent employment has been made of Heffter's variations and suggestions, for upon that book Heffter is the leading authority. Gneist's edition, as is well-known, is a recension of all the German editions prior to 1857, the date of its publication. The chief of these editions we ought perhaps to enumerate; as to the others the reader will find full information in the preface to Böcking's fourth edition, published at Leipzig in 1855. The *Editio Princeps* of 1820 was brought out by Göschen, four years after Niebuhr's discovery of the manuscript. Upon Bluhme's fresh collation of the MS. a second edition, embodying his discoveries, corrections and suggestions, was given to the world by Göschen in 1824. It is of this edition that Böcking remarks: "Hujus exempli quam diu nostris suis stabit honor, nunquam pretium diminuetur." Death interrupted Göschen in his task of bringing out a third edition, but his work was completed and published by Lachmann in 1842. Böcking's editions appeared successively in 1837, 1841, 1850 and 1855. Heffter's elaborate commentary and carefully emended text of the fourth book bears the date 1827.

From all these and from other editions of minor importance Gneist drew up a text in 1857. To this text, as was said above, we have generally adhered, retaining also Gneist's plan of printing in italics those words and sentences which have been

filled in conjecturally where lacunae appeared in the manuscript. In the troublesome task of verifying these italics we have depended on the reprint of the Verona MS. itself, which Böcking published in 1866. In the preface to this work, written by Göschen, the date of the MS. is referred to a time anterior to the age of Justinian: a conclusion in which Niebuhr and Koppe coincide.

Huschke's valuable suggestions for emendation of the text have, as the reader will observe, been frequently adopted by the editors of the present translation. These are to be found in the various works of that learned civilian which appeared between 1830 and 1855.

In the translation we have adhered as literally to the text as possible, preferring to explain difficult passages in notes rather than to paraphrase them.

The notes are not intended to give a complete outline of Roman Law, but merely to elucidate the author's meaning; and if we have erred on the side of brevity, we have done so because we desired to present to the reader Gaius himself, rather than Gaius hidden or overburdened with commentary. With this view we have remitted to an Appendix several of our longer notes.

Our quotations have been as much as possible confined to Text-books easy of access, to Classical authors, and to the Sources. Wherever a well-recognized authority has clearly explained the matter in hand a mere reference has been given. In quoting the Sources we have adopted the numerical mode of reference, thus *Inst.* 1. 2. 3. signifies Justinian's *Institutes*, first book, second title, third paragraph, and *D.* 4. 3. 2. 1. means Digest, fourth book, third title, second law, first paragraph. Those to whom the verification of passages in the Digest and Institutes is a novelty should take notice that the opening paragraph of every law in the former, and the opening paragraph of every title in the latter, bear no number, but are marked by the symbol *pr.*, an abbreviation for *principium*.

Gaius himself is quoted without name: thus II. 100 denotes the 100th paragraph of the second commentary of Gaius.

# THE COMMENTARIES OF GAIUS.

## BOOK I.

### *JURE GENTIUM ET CIVILI.*

1. *Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur: nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium homi-*

1. All collections of human beings which are governed by laws and customs employ a system of law that is partly peculiar to themselves, partly shared in common by all mankind: for what any set of people hath established as law for its own guidance is special to itself and is called its *Jus Civile*, the particular law, so to speak, of that state: but that which natural reason hath established amongst all men is guarded in equal degree amongst all sets of people and is called *Jus Gentium*, the law, so to speak, which all nations employ<sup>1</sup>. The Roman people, therefore, make use of a system of law

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<sup>1</sup> Austin's *Jurisprudence*, Lecture 31, 32. See also Lect. 5, pp. 117, 161 (pp. 179 and 214, third edition). Maine's *Ancient Law*, ch. 3.

num iure utitur. Quae singula qualia sint, suis locis proponemus.

2. Constant autem iura ex legibus, plebiscitis, senatusconsultis, constitutionibus Principum, edictis eorum qui ius edicendi habent, responsis prudentium.

3. Lex est quod populus iubet atque constituit. Plebiscitum est quod plebs iubet atque constituit. Plebs autem a populo eo distat, quod populi appellatione universi cives significantur, connumeratis etiam patriciis; plebis autem appellatione sine patriciis ceteri cives significantur. Unde olim patricii dicebant plebiscitis se non teneri, quia sine auctoritate eorum facta essent. sed postea lex Hortensia lata est, qua cautum est ut plebiscita universum populum tenerent. itaque eo modo legibus exaequata sunt.

which is partly their own in particular, partly common to all mankind. What each of these sets of rules is, we shall explain in their proper places.

2. Now rules of law consist of *leges*, *plebiscita*, *senatusconsulta*, constitutions of the emperors, edicts of those who have the right of issuing edicts and responses of the learned in the law.

3. A *lex* is what the *populus* directs and establishes. A *plebiscitum* is what the *plebs* directs and establishes: the plebs differing from the *populus*<sup>1</sup> herein, that by the appellation of *populus* the collective body of the citizens, including the patricians, is denoted, whilst by the appellation of *plebs* is denoted the rest of the citizens, excluding the patricians. Hence in olden times the patricians used to say that they were not bound by plebiscites, because they were passed without their authority: but at a later period the Lex Hortensia was carried, whereby it was provided that plebiscites should be binding on the whole *populus*, and therefore in this way they were put on a level with *leges*<sup>2</sup>.

<sup>1</sup> For Austin's notion of the distinction between *populus* and *plebs*, see Vol. II. p. 197 (p. 531, third edition). Also read Niebuhr's *Lectures on Roman History*, Vol. I. pp. 164—171.

<sup>2</sup> The senate up to the time of the Hortensian law had possessed a  *veto* on the decrees of the tribes, this being then abolished, the result laid down in the text was the consequence. Lex Hortensia, B.C. 286.

4. *Senatusconsultum* est quod senatus iubet atque constituit, idque legis vicem optinet, quamvis fuerit quaesitum.

5. *Constitutio Principis* est quod Imperator decreto vel edicto vel epistula constituit. nec umquam dubitatum est, quin id legis vicem optineat, cum ipse Imperator per legem imperium accipiat.

6. Ius autem edicendi habent magistratus populi Romani. sed amplissimum ius est in edictis duorum Praetorum, urbani et peregrini: quorum in provinciis iurisdictionem Praesides earum habent; item in edictis Aedilium curulium, quorum iurisdictionem in provinciis populi Romani Quaestores habent; nam in provincias Caesaris omnino Quaestores non mittuntur, et ob id hoc edictum in his provinciis non proponitur.

4. A *senatusconsultum* is what the senate directs and establishes, and it has the force of a *lex*, although this point was at one time disputed<sup>1</sup>.

5. A constitution of the emperor is what the emperor establishes by his decree, edict, or rescript<sup>2</sup>; nor has there ever been a doubt as to this having the force of a *lex*, since it is by a *lex* that the emperor himself receives his authority.

6. The magistrates of the Roman people have the right of issuing edicts: but the most extensive authority attaches to the edicts of the two praetors, *Urbanus* and *Peregrinus*<sup>3</sup>, the counterpart of whose jurisdiction the governors of the provinces have therein: also to the edicts of the Curule Aediles, the counterpart of whose jurisdiction the Quaestors have in the provinces of the Roman people: for Quaestors are not sent at all into the provinces of Caesar, and therefore this (Aedilitian) edict is not promulged therein<sup>4</sup>.

<sup>1</sup> Theophilus says that the force of laws was given to *Seta*. by the *Lex Hortensia*; Theoph. lib. 1. Tit. 2. 5. But see Niebuhr's remarks on this law, *Lectures on Roman History*, Vol. 1. pp. 322, 323.

<sup>2</sup> *Decretum* = a decision given by the emperor in his capacity of judge.

*Edictum* = a general constitution.

*Rescriptum* = *epistula* = the emperor's solution of a legal difficulty propounded to him by a magistrate

or private person; and if by the former, preceding such magistrate's judgment and furnishing him with principles on which to base it. See Austin, Lect. 28, p. 200 (p. 534, third edition).

<sup>3</sup> Niebuhr's *Lectures on Roman History*, Vol. 1. p. 403.

<sup>4</sup> In the imperial times the provinces were divided into two classes, *provinciae imperatoriae* or *Caesaris*, governed by *legati* appointed by the

7. Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrant, id quod ita sentiunt legis vicem optinet; si vero dissentiunt, iudici licet quam velit sententiam sequi: idque rescripto divi Hadriani significatur.

#### DE JURIS DIVISIONE.

8. Omne autem ius quo utimur vel ad personas pertinet, vel ad res, vel ad actiones. sed prius videamus de personis.

#### DE CONDICIONE HOMINUM.

9. Et quidem summa divisio de iure personarum haec est, quod omnes homines aut liberi sunt aut servi.

10. Rursus liberorum hominum alii ingenui sunt, alii libertini.

7. The responses of the learned in the law are the expressed views and opinions of those to whom license<sup>1</sup> has been given to expound the laws: and if the opinions of all these are in accord, that which they so hold has the force of a *lex*: but if they are not in accord, the *judex* is at liberty to follow which opinion he pleases, as is stated in a rescript of the late emperor Hadrian<sup>2</sup>.

8. The whole body of law which we use relates either to persons or to things or to actions. But first let us consider about persons<sup>3</sup>.

9. The primary division then of the law of persons is this, that all men are either free or slaves.

10. Of freemen again some are *ingenui*, some *libertini*.

emperor, and *provinciae senatoriae*, governed by proconsuls nominated by the senate. This division was done away with about the middle of the 3rd century.

<sup>1</sup> The jurisprudentes in the most ancient times took up the profession at their pleasure, and gave their advice gratuitously. Augustus commanded that none should practise without a license, and it is to this

licensing that the words "quibus permissum est" refer. See D. i. 2. 2. 47.

<sup>2</sup> See Austin, Lect. 28, on the classification of laws.

<sup>3</sup> Austin discusses the signification of "person," natural or legal, in Lecture 12.

The distinction between the law of persons and of things is treated of in Lecture 40.

11. *Ingenui* sunt, qui liberi nati sunt; *libertini*, qui ex iusta servitute manumissi sunt.

12. Rursus *libertinorum tria sunt genera: nam aut cives Romani, aut Latini, aut dediticiorum* numero sunt. de quibus singulis dispiciamus; ac prius *de dediticiis*.

DE DEDITICIIS VEL LEGE AELIA SENTIA.

13. Lege itaque Aelia Sentia cavetur, ut qui servi a dominis poenae nomine vincti sint, quibusve stigmata inscripta sint, de quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse convicti sint, quique *ut* ferro aut cum bestiis depugnarent traditi sint, in ludum custodiamve coniecti fuerint, et postea vel ab *eodem* domino vel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii. [DE PEREGRINIS DEDITICIIS.] (14.) Vocantur autem *peregrini dediticii* hi qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde, *ut* victi sunt, se dediderunt. (15.) Huius ergo turpitudinis servos quocumque modo

11. *Ingenui* are those who are born free: *libertini* are those who have been manumitted from servitude recognized by the law.

12. Of *libertini* again there are three classes, for they are either Roman citizens, or Latins, or in the category of the *dediticii*. Let us consider these one by one, and first as to *dediticii*.

13. It is provided then by the Lex Aelia Sentia<sup>1</sup>, that such slaves as have been put in chains by their masters by way of punishment, or have been branded, or examined by torture on account of misdeed, and convicted of the misdeed, or have been delivered over to fight with the sword or against wild-beasts, or cast into a gladiatorial school or a prison, and have afterwards been manumitted either by the same or another master, shall become freemen of the same class whereof are *peregrini dediticii*. 14. Now those are called *peregrini dediticii* who aforesaid have taken up arms and fought against the Roman people, and then, when conquered, have surrendered themselves. 15. Slaves then who have been visited

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<sup>1</sup> Enacted A. D. 4. Ulpian, I. 11. D. 40. 9.



et cuiuscumque aetatis manumissos, etsi pleno iure dominorum fuerint, numquam aut cives Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constitui intellegemus.

16. Si vero in nulla tali turpitudine sit servus, manumissum modo civem Romanum, modo Latinum fieri dicemus. (17.) Nam in cuius persona tria haec concurrunt, ut maior sit annorum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione liberetur, id est vindicta aut censu aut *testamento*, is civis Romanus fit: sin vero aliquid eorum deerit, Latinus erit.

#### DE MANUMISSIONE VEL CAUSAE PROBATIONE.

18. Quod autem de aetate servi requiritur, lege Aelia Sentia introductum est. nam ea lex minores xxx annorum servos non aliter voluit manumissos cives Romanos fieri, quam si vindicta, aput consilium iusta causa manumissionis adprobata,

with such disgrace, in whatever manner and at whatever age they have been manumitted, even although they belonged to their masters in full title<sup>1</sup>, we shall never admit to become Roman citizens or Latins, but shall under all circumstances understand to be put in the category of *dediticii*<sup>2</sup>.

16. But if a slave have fallen under no such disgrace, we shall say, that when manumitted he becomes in some cases a Roman citizen, in others a Latin. 17. For in whatsoever man's person these three qualifications are united, (1) that he be above thirty years of age; (2) the property of his master "ex jure Quiritium;" and (3) liberated by a regular and lawful manumission, *i.e.* by *vindicta*, *census*, or *testament*<sup>3</sup>, such an one becomes a Roman citizen: but if any one of these qualifications be wanting he will be a Latin.

18. The requirement as to the age of the slave was introduced by the Lex Aelia Sentia. For that law prohibited slaves manumitted under thirty years of age from becoming Roman citizens unless they were liberated by *vindicta* after lawful

<sup>1</sup> "Pleno iure" = "ex jure Quiritium;" *i.e.* not merely "in bonis:" for the signification of which terms see II. 40. Compare also § 17 below.

<sup>2</sup> For further information as to *liticii* see III. 74; Ulp. I. 11.

<sup>3</sup> II. 267, 276. Sandais' p. 91. Niebuhr is of opinion that the rights which ensued upon the various kinds of manumission, were not identical, *Hist. of Rome*, Vol. I. p. 394. Ulpian, I. 6, 8, 10, 12, 16.

liberati fuerint. (19.) Iusta autem causa manumissionis est veluti si quis filium filiamve, aut fratrem sororemve naturalem, aut alumnum, aut *paedagogum*, aut servum procuratoris habendi gratia, aut ancillam matrimonii causa, aput consilium manumittat. [DE RECUPERATORIBUS.] (20.) Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum puerum; in provinciis autem viginti recuperatorum civium Romanorum. idque fit ultimo die conventus: sed Romae certis diebus aput consilium manumittuntur. Maiores vero triginta annorum servi semper manumitti solent, adeo ut vel in transitu manumittantur, veluti cum Praetor aut Proconsule in balneum vel in theatrum eat. (21.) Praeterea minor triginta annorum servus manumissione potest civis Romanus fieri, si ab eo domino qui solvendo non erat, *testamento* eum liberum et heredem relictum—[*desunt lin. 24*].

cause for manumission had been approved before the council. 19. Now lawful cause for manumission is, for instance, where one manumits before the council a son or daughter, or natural brother or sister, or foster-child, or personal attendant, or slave with the intent of making him his *procurator*<sup>1</sup>, or female slave for the purpose of marrying her.

20. Now the council consists in the city of Rome of five Senators and five Knights, Romans of the age of puberty<sup>2</sup>: in the provinces of twenty *Recuperatores*<sup>3</sup>, Roman citizens. And this proceeding (the manumission) takes place on the last day of their assembly, whereas at Rome men are manumitted before the council on certain fixed days. But slaves over thirty years of age can be manumitted at any time, so that they can be manumitted even *in transitu*, for instance when the Praetor or Proconsul is on his way to the bath or the theatre. 21. Further a slave under thirty years of age can by manumission become a Roman citizen, if (it were declared) by an insolvent master in his will that he was left free and an heir<sup>4</sup>.....

<sup>1</sup> IV. 84.

<sup>2</sup> I. 196.

<sup>3</sup> *Recuperatores*. See Lord Mackenzie's *Roman Law*, p. 310, and Cicero *pro Tullio*, 8. The name

was subsequently applied to officers holding an analogous position in the provinces. Ulpian, I. 13 a; cf. Plin. *Ep.* III. 20.

<sup>4</sup> II. 154; Ulpian, I. 14.

22. ...*manumissi sunt*, *Latini Juniani dicuntur*: *Latini* ideo, *quia* adsimulati *sunt Latinis coloniariis*; *Juniani* ideo, *quia* per *legem Juniam* libertatem acceperunt, *cum* olim servi viderentur esse. (23.) Non *tamen* illis permittit *lex Junia* nec ipsis testamentum facere, nec ex testamento alieno capere, nec tutores testamento dari. (24.) Quod autem diximus ex testamento eos *capere non* posse, *ita intellegendum est, ut nihil* directo hereditatis legatorumve nomine eos posse capere dicamus; alioquin per fideicommissum capere possunt.

25. Hi vero qui *dediticiorum* numero sunt nullo modo *ex testamento* capere possunt, non magis quam qui liber peregri-

22. .... are manumitted are called *Latini* *Latini* because they are put on the same footing with the Latin colonists<sup>2</sup>: *Juniani* because they have received their liberty under the *Lex Junia*<sup>3</sup>, whereas in former times they were considered to be slaves<sup>4</sup>. 23. The *Lex Junia* does not, however, allow them either to make a testament for themselves, or to take anything by virtue of another man's testament, or to be appointed tutors<sup>5</sup> (guardians) by testament. 24. Nevertheless our statement that they cannot take under a testament must be thus understood, that we affirm that they can take nothing directly by way of inheritance or legacy; they can, on the other hand, take by *fideicommissum*<sup>6</sup>.

25. But those who are in the category of *dediticii* cannot take under a testament at all, any more than can one who is free

<sup>1</sup> The general sense of the lost words at the beginning of this paragraph no doubt was that those who were manumitted, though not fulfilling all the three conditions of § 17, were Junian Latins. Read III. 56.

<sup>2</sup> The Latin colonists here meant are not the inhabitants of the old Latin towns (whose franchise is called *majus Latium* by Niebuhr), who had full civic rights by the Julian law: but the colonists and inhabitants of the towns of Cisalpine Gaul, who were raised to the rank of Latins by a law of Cn. Pompeius Strabo; the

bulk of the population, however, being debarred from *conubium*, and those who held magistracies alone receiving Roman citizenship. See note on I. 95. This franchise Niebuhr calls "*minus Latium*," *Hist. of Rome*, Vol. II. pp. 77—81.

<sup>3</sup> *Lex Junia Norbana*, A. D. 19.

<sup>4</sup> In ancient times slaves manumitted irregularly only held their liberty on sufferance. Their masters could recall them into slavery, hence "*olim servi videbantur esse*." III. 56; Ulpian, I. 12.

<sup>5</sup> I. 144...

<sup>6</sup> II. 246.

nusque *est*. nec ipsi *testamentum* facere possunt secundum *quod plerisque placuit*. (26.) Pessima itaque libertas eorum est qui dediticiorum numero sunt: nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad civitatem Romanam datur. (27.) Quin et in urbe Roma vel intra centesimum urbis Romae miliarium morari prohibentur; et *si contra fecerint*, ipsi bonaque eorum publice venire iubentur ea conditione, ut ne in urbe Roma vel intra centesimum urbis Romae miliarium serviant, *neve umquam manumittantur*; et si *manumissi* fuerint, servi populi Romani esse iubentur. et haec ita lege Aelia Sentia comprehensa sunt.

QUIBUS MODIS LATINI AD CIVITATEM ROMANAM PERVENIANT.

28. Latini multis modis ad civitatem Romanam perveniunt. (29.) *Statim* enim *eadem* lege Aelia Sentia cautum est, ut minores triginta annorum manumissi *et* Latini facti, si uxores duxerint vel cives Romanas, vel Latinas coloniaras, *vel eiusdem* condicionis cuius et ipsi essent, idque testati fu-

and a foreigner; nor can they, according to general opinion, make a testament themselves<sup>1</sup>. 26. The liberty, therefore, of those who are in the category of *dediticii* is of the lowest kind, nor is access to Roman citizenship allowed them by any *lex*, *senatusconsultum*, or imperial constitution. 27. Nay more, they are forbidden to dwell within the city of Rome or within a hundred miles of the city of Rome, and if they transgress this rule they themselves and their goods are ordered to be sold publicly, with the proviso that they do not serve as slaves within the city of Rome nor within a hundred miles of the city of Rome, and be never manumitted: and if they be manumitted they are ordered to become slaves of the Roman people. And these things are so laid down in the Lex Aelia Sentia.

28. Latins attain to Roman citizenship in many ways. 29. For it was expressly provided by the same Lex Aelia Sentia, that slaves manumitted under the age of thirty years and made Latins, if they have married wives who are either Roman citizens, or Latin colonists, or of the same condition of which they themselves were, and have made attestation of

<sup>1</sup> III. 75; Ulp. xx. 14.

erint adhibitis non minus quam septem testibus civibus Romanis puberibus, et filium procreaverint, *et* is filius anniculus fuerit, permittatur eis, *si velint*, per eam legem adire Praetorem vel in provinciis Praesidem provinciae, et adprobare se ex lege *Aelia Sentia* uxorem duxisse et ex ea filium anniculum habere; et si is aput quem causa probata est id ita esse pronuntiaverit, tunc et ipse Latinus et uxor eius, si et ipsa eiusdem *condicionis sit, et ipsorum filius, si et ipse eiusdem* condicionis sit, cives Romani esse iubentur. (30.) Ideo autem in *ipsorum filio* adiecimus “si et ipse eiusdem condicionis sit,” *quia* si uxor Latini civis Romana est, qui ex ea

this in the presence of not less than seven witnesses, Roman citizens of the age of puberty<sup>1</sup>, and have begotten a son, and this son have attained the age of one year, shall be allowed, if they please, to apply, in virtue of that law, to the Praetor, or in the provinces to the governor, and adduce proof that they have married a wife in accordance with the provisions of the *Lex Aelia Sentia*, and have a son a year old; and if he before whom the case is proved, shall declare that it is as they say, then both the Latin himself, and his wife (if she be of the same condition), and their son (if he also be of the same condition), are ordered to become Roman citizens<sup>2</sup>. 30. For this reason do we add with reference to their son, “if he also be of the same condition,” because if the wife of the Latin be a Roman citizen, the child born from her is a Roman citizen by birth in virtue of a recent *senatusconsultum*,

<sup>1</sup> I. 106.

<sup>2</sup> I. 66, 80; III. 73; Ulpian, III. 3. There is an apparent contradiction upon this subject between Gaius and Ulpian. The former, as we see, attributes the regulations respecting the proof in these cases to the *Lex Aelia Sentia*, whilst the latter ascribes them to the *Lex Junia Norbana*. Most modern writers on the history of the old Roman law agree in affixing a later date to the Junian than to the Aelian law. To reconcile this apparent discrepancy, it is supposed that the later *lex*, which was passed in the reign of Tiberius,

was to a very great extent a confirmatory enactment, embracing in it most of the regulations of the prior *lex* passed in the reign of Augustus, and therefore that the authors are right in ascribing the regulations respecting the *probatio causae* to either law. A French writer, M. Marchandy, has contended with considerable show of reason that the *Lex Junia* preceded the *Lex Aelia*, and was in existence in the time of Cicero: see *Thémis*, Tom. 8. The subject has been discussed at length by Hollweg in his *Dissertatio de causae probatione*.

nascitur ex novo senatusconsulto quod auctore divo Hadriano factum est, civis Romanus nascitur. (31.) Hoc tamen ius adipiscendae civitatis Romanae etiamsi soli minores *triginta* annorum manumissi et Latini facti ex lege Aelia Sentia habuerunt, tamen postea senatusconsulto quod Pegaso et Pusione Consulibus factum est, *etiam* maioribus triginta annorum manumissis Latinis factis concessum est. (32.) Ceterum etiamsi ante *decesserit* Latinus, *quam* anniculi filii causam probarit, potest mater eius causam probare, et sic et ipsa fiet civis Romana [*desunt* 39. *lin.* (33. 34.)]. (35.) *si quis alicuius et in bonis et ex iure Quiritium sit*, manumis-

which was enacted at the instance<sup>1</sup> of the late emperor Hadrian.

31. Although they alone who were manumitted under thirty years of age and made Latins, had this right of obtaining Roman citizenship in virtue of the Lex Aelia Sentia, yet it was afterwards granted by a *senatusconsultum*<sup>2</sup>, enacted in the consulship of Pegasus and Pusio, to those also who were manumitted and made Latins when over thirty years of age<sup>3</sup>.

32. Further, even if the Latin die before he has proved his case in respect of a son one year old, the mother can tender proof, and thus she will herself also become a Roman citizen.

33. 34<sup>4</sup>. .....

35. If a slave belong to any man both *in bonis* and *ex jure Quiritium*<sup>5</sup>, when manumitted, (by this same owner, that is

<sup>1</sup> The *comitia* or senate in early imperial times still legislated in appearance, but their legislation was according to the emperor's suggestion. The *comitia* being incommo-  
dious tools, the work of legislation was usually done by the senate, the smaller and more manageable body; but the senate had no free action, their *senatusconsulta* were at the *instance of the prince*. See Austin, Vol. II. p. 200 (p. 534, third edition).

<sup>2</sup> A.D. 75.

<sup>3</sup> Who were Latins, that is to say, by failure of one or other of the conditions marked (2) and (3) in § 17 above.

<sup>4</sup> In the 19th and 20th lines of

the missing 39, Goschen proposes a reading founded on the appearance of the MS., which at that point is somewhat more distinct, as follows: "By the Lex Julia it was enacted that if a Latin had expended not less than a half (sixth?) of his patrimony in the construction of a house at Rome, he should obtain the Quiritarian rights."

From Ulpian, III. 1, a portion of the missing paragraph 34 may be thus supplied: "A Latin obtains Roman citizenship by a ship, if he build one of not less than 10,000 *modii* burden and uses it for carrying corn to Rome for six years."

<sup>5</sup> II. 40.

sus, ab eodem scilicet, et Latinus fieri potest et ius Quiritium consequi.

36. *Non tamen cuicumque volenti manumittere licet.* (37.) *nam is qui in fraudem creditorum vel in fraudem patroni manumittit, nihil agit, quia lex Aelia Sentia inpediit libertatem.*

38. Item eadem lege minori xx annorum domino non aliter manumittere permittitur, quam si vindicta aput consilium iusta causa manumissionis adprobata fuerit. (39.) Iustae autem

to say,) he can both become a Latin and obtain the "Jus Quiritium" (*i.e.* become a Roman citizen<sup>1</sup>).

36. Moreover the law does not allow any one who chooses to manumit<sup>2</sup>. 37. For he who manumits with the view of defrauding his creditors or his patron<sup>3</sup> effects nothing, since the Lex Aelia Sentia bars the gift of freedom.

38. Likewise by the same law a master under twenty years of age is not allowed to manumit except by *vindicta*<sup>4</sup>, (after) a lawful cause for manumission has been proved before the council. 39. Lawful cause of manumission is, for instance,

<sup>1</sup> This passage is capable of two interpretations, either the one here given, which is in effect that a master could under the conditions specified, confer upon his slave either the *Latinitas* or the *civitas*; (the latter would be the result of a manumission *per vindictam*;) or else it may refer to the method of manumission termed *iteratio*, and this, as Ulpian tells us, was the result of a second manumission granted to one who from a slave had been made a Latin, the manumittor being his original master. See Ulpian, III. 4.

<sup>2</sup> See Ulpian, I. 12—25, for a complete list of the cases where manumission is not allowed.

<sup>3</sup> The *patronus* is the former master of a *libertinus*. The *jura patronatus* were

(a) *Obsequia*: duties attaching upon the *libertinus* by operation of law, e.g. to furnish ransom for the patron if taken prisoner, to assist in furnishing dower for his daughter, and to contribute to his expenses in

law-suits, &c.

(β) *Jura in bonis*: rights of succession on the part of the *patronus* to the goods of the *libertinus*. III. 39 et seqq.

(γ) *Operae*: services reserved by special agreement as a consideration for the manumission.

It is scarcely necessary to say that a freedman is styled *libertinus* in respect of his class, *libertus* in reference to his former master.

<sup>4</sup> There is good reason for objecting to the words "except by *vindicta*," for though they appear in the Institutes of Justinian, they are not to be found in the Commentary of Theophilus nor in the fragments of Ulpian, and it need hardly be said that in matters of historical information upon the old Roman law, Justinian's treatise is valueless. Niebuhr and Göschen think the passage should have the following collocation of words, "*non aliter vindicta manumittere permittitur quam si aput, &c.*"



causae manumissionis sunt : veluti si quis patrem aut matrem aut paedagogum aut conlactaneum manumittat. sed et illae causae, quas superius in servo minore xxx annorum exposuimus, ad hunc quoque casum de quo loquimur adferri possunt. item ex diverso hae causae, quas in minore xx annorum domino rettulimus, porrigi possunt et ad servum minorem xxx annorum.

40. Cum ergo certus modus manumittendi minoribus xx annorum dominis per legem Aeliam Sentiam constitutus sit, evenit, ut qui xiiii annos aetatis expleverit, licet testamentum facere possit, et in eo heredem sibi instituere legataque relinquere possit, tamen, si adhuc minor sit annorum xx, libertatem servo dare non potest. (41.) Et quamvis Latinum facere velit minor xx annorum dominus, tamen nihilominus debet aput consilium causam probare, et ita postea inter amicos manumittere.

42. Praeterea lege Furia Caninia certus modus constitutus

if a man manumits his father, or mother, or personal attendant, or foster-brother. And those causes too which we enumerated above<sup>1</sup> in reference to a slave under thirty years of age, can be applied to this case also about which we are now speaking. So, conversely, those causes which we have specified with reference to a master under twenty years of age, can be extended also to the case of a slave under thirty years of age.

40. As then a certain method of manumitting has been imposed by the Lex Aelia Sentia on masters under twenty years of age, the result is that one who has completed his fourteenth year, although he can make a testament and in it institute an heir to himself and leave legacies, yet cannot, if he be still under twenty years of age, give liberty to a single slave. 41. And even though a master under twenty years of age wish to make a man a Latin (merely), yet he must still prove the cause before the council and then afterwards manumit him privately (inter amicos)<sup>2</sup>.

42. Further by the Lex Furia Caninia<sup>3</sup>, a certain mode of

<sup>1</sup> I. 19.

<sup>2</sup> This was one of the modes of manumission arising out of custom, and recognized by the Praetor. It was a very simple affair, for all that

was required was for the master to direct his slave to go free, in the presence of five witnesses.

<sup>3</sup> Passed A.D. 8. Ulpian, I.



est in servis testamento manumittendis. (43.) nam ei qui plures quam duos neque plures quam decem servos habebit, usque ad partem dimidiam eius numeri manumittere permittitur. ei vero qui plures quam x neque plures quam xxx servos habebit, usque ad tertiam partem eius numeri manumittere permittitur. at ei qui plures quam xxx, neque plures quam centum habebit, usque ad partem quartam *manumittere permittitur, nec latior licentia* datur. novissime ei qui plures quam c habebit, nec plures quam D, *amplius non* permittitur, quam ut quintam partem neque plures *manumittat*. sed praescribit lex, ne cui plures manumittere liceat quam c. *igitur* si quis unum servum omnino aut duos habet, *de eo hac lege nihil cautum est*; et ideo liberam habet potestatem manumittendi. (44.) Ac nec ad eos *quidem* omnino haec lex pertinet, qui sine testamento manumittunt. itaque licet iis, qui vindicta aut censu aut inter amicos manumittunt, totam familiam suam liberare, scilicet si alia causa non inpediat libertatem. (45.) Sed quod *de* numero servorum testamento manumittendorum diximus, ita intellegemus, *ut ex eo*

proceeding was established for the manumission of slaves by testament: 43. for a man who has more than two, and not more than ten slaves, is allowed to manumit to the extent of half the number. A man, again, who has more than ten and not more than thirty slaves is allowed to manumit to the extent of one-third of the number. A man, again, who has more than thirty and not more than a hundred is permitted to manumit to the extent of a fourth part, nor is greater license allowed him. Lastly, a man who has more than a hundred, and not more than five hundred, is allowed nothing further than to manumit a fifth part and no greater number. But the law prescribes that no man shall be allowed to manumit more than a hundred. If, therefore, any man have only one or two slaves, there is nothing provided in this law with respect to him, and so he has unrestrained power of manumitting.

44. Nor does this law in any way extend to those who manumit otherwise than by testament. Therefore those who manumit by *vindicta*, *census*, or *inter amicos*, may set free their whole gang, provided no other cause stands in the way of the gift of freedom. 45. But what we have said about the number of slaves which can be manumitted by testament, we

numero, ex quo dimidia aut tertia aut quarta aut quinta pars liberari *potest, utique tot manumittere liceat*, quot ex antecedenti numero licuit. et hoc ipsa *lege* provisum est. erat enim sane absurdum, ut ex servorum domino quinque liberare liceret, quia usque ad dimidiam partem *ex eo* numero manumittere ei conceditur, *ulterius autem* XII servos habenti non plures liceret manumittere quam IIII. at eis qui plures quam X neque [*desunt lin. 24*]. (46.) Nam et si testamento scriptis in orbem servis libertas data sit, quia nullus ordo manumissionis invenitur, nulli liberi erunt; quia lex Furia Caninia quae in fraudem eius facta sint rescindit. sunt etiam specialia *senatusconsulta*, quibus rescissa sunt ea quae in fraudem eius legis excogitata sunt.

47. In summa sciendum est, *cum* lege Aelia Sentia cautum

shall interpret thus, that from a number out of which the half, third, fourth, or fifth part can be set free, it is certainly allowed to manumit as many as could have been manumitted out of an antecedent (*i.e.* smaller) number. And this provision is found in the *lex* itself. For it would indeed be absurd that a master having ten slaves should be allowed to manumit five, because he is at liberty to manumit to the extent of half out of the number, whilst one who had a larger number, twelve, should not be allowed to manumit more than four<sup>1</sup>. But that those who have more than ten and not.....<sup>2</sup>.

46. For also if liberty be given by testament to slaves whose names are written in a circle, none of them will be free, since no order of manumission can be found: for the Lex Furia Caninia sets aside whatever is done for its evasion. There are also special *senatusconsulta* by which all devices for the evasion of the *lex* are set aside.

47. Finally, we must observe that the provision of the Lex

<sup>1</sup> The owner of twelve could manumit five, for he would reckon the 12 as 10, "ex antecedenti numero:" and so for other cases.

<sup>2</sup> The lost portion of the MS. contained a further provision of the *lex*, that the slaves to be liberated should be mentioned by name, and that if the testator had nominated more than the number allowed by

law, those whose names stood first on the list should be liberated in order, until the proper number had been completed. Testators having adopted the plan of writing the names in a circle to evade this regulation, the interpretation of § 46 was brought to bear against them. Ulpian, 1. 25.

sit, ut *qui* creditorum fraudandorum causa manumissi sint liberi non fiant [37.], etiam hoc ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani); cetera vero iura eius legis ad peregrinos non pertinere.

48. Sequitur de iure personarum alia divisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae. (49.) Sed rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in mancipio sunt. (50.) Videamus nunc de iis quae alieno iuri subiectae sint: si cognoverimus quae istae personae sint, simul intellegemus quae sui iuris sint.

51. Ac prius dispiciamus de iis qui in aliena potestate sunt.

52. In potestate itaque sunt servi dominorum. quae quidem potestas iuris gentium est: nam apud omnes peraeque

Aelia Sentia, that those manumitted for the purpose of defrauding creditors are not to become free, applies to foreigners as well as citizens (*etiam*), (for) the senate so decreed at the instance of Hadrian: but the other clauses of the *lex* do not apply to foreigners<sup>1</sup>.

48. Next comes another division of the law of persons. For some persons are *sui juris*<sup>2</sup>, some are subject to the *jus* (authority) of another. 49. But again of those persons who are subject to the authority of another, some are in *potestas*, some in *manus*, some in *mancipium*. 50. Let us consider now about those who are subject to another's authority: if we discover who these persons are, we shall at the same time understand who are *sui juris*.

51. And first let us consider about those who are in the *potestas* of another.

52. Slaves, then, are in the *potestas* of their masters, which *potestas* is a creature of the *jus gentium*<sup>4</sup>, for we may perceive

<sup>1</sup> This is one of the instances of the value of the discovery of Gaius's treatise in relation to historical information. The existence of this regulation of the Lex Aelia Sentia, by which an enfranchisement made for the purpose of defrauding creditors affected foreigners as well as citi-

zens, was utterly unknown before the publication of these commentaries.

<sup>2</sup> Ulpian, IV. 1.

<sup>3</sup> See Appendix (A).

<sup>4</sup> But see Austin, Vol. II. p. 265 (p. 583, third edition), on the question of slavery being according to natural law or not.

gentes animadvertere possumus dominis in servos vitae necisque potestatem esse. et quodcumque per servum acquiritur, id domino acquiritur. (53.) Sed hoc tempore neque civibus Romanis, nec ullis aliis hominibus qui sub imperio populi Romani sunt, licet supra modum et sine causa in servos suos saevire. Nam ex constitutione *sacratissimi* Imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri iubetur, quam qui alienum servum occiderit. Sed et maior quoque asperitas dominorum per eiusdem Principis constitutionem coercetur. Nam consultus a quibusdam Praesidibus provinciarum de his servis, qui ad fana deorum vel ad statuas Principum confugiunt, praecepit, ut si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere. Et utrumque recte fit; male enim nostro iure uti non debemus:

that amongst all nations alike masters have the power of life and death over their slaves. Also whatever is acquired by means of a slave is acquired for the master<sup>1</sup>. 53. But at the present day neither Roman citizens, nor any other men who are under the empire of the Roman people, are allowed to practise excessive and wanton severity upon their slaves. For by a decree of the emperor Antoninus of most holy memory, he who kills his own slave without cause is ordered to be no less amenable than he who kills the slave of another. Further, the extravagant cruelty of masters is restrained by a constitution of the same emperor; for when consulted by certain governors of provinces with regard to those slaves who flee for refuge to the temples of the gods or the statues of the emperors, he ordered, that if the cruelty of the masters appear beyond endurance, they shall be compelled to sell their slaves. And both these rules are just: for we ought not to make a

<sup>1</sup> II. 86...Observe that the reading is *acquiritur*, not *adquiri*; so that Gaius only asserts that the *vitae necisque potestas* is a creature of the Jus Gentium: and makes no statement as to why the master had the slave's acquisitions. Savigny says that slaves were by some nations

allowed to have property, *e.g.* by the Germans, and that therefore Gaius has intentionally used the indicative mood to draw our attention to the fact that the second incident springs from the Civil Law. "Savigny on Possess. translated by Perry," p. 53, note.

qua ratione et prodigis interdicatur bonorum suorum administratio,

54. Ceterum cum apud cives Romanos duplex sit dominium, (nam vel in bonis vel ex iure Quiritium vel ex utroque iure cuiusque servus esse intellegitur), ita demum servum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit. nam qui nudum ius Quiritium in servo habet, is potestatem habere non intellegitur.

55. Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreavimus. quod ius proprium civium Romanorum est. fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus. idque divus Hadrianus edicto quod proposuit de his, qui sibi liberisque suis ab eo civitatem Romanam petebant, significavit. nec me praeterit Galatarum gentem credere, in potestatem parentum liberos esse.

bad use of our right, and on this principle too the management of their own property is forbidden to prodigals.

54. But since among Roman citizens ownership is of two kinds (for a slave is understood to belong to a man either *in bonis* or *ex jure Quiritium*, or by both titles)<sup>1</sup>, we shall hold that a slave is in his master's *potestas* only in case he be his *in bonis*, even if he be not the same man's *ex jure Quiritium* also. For he who has the bare *jus Quiritium* over a slave is not understood to have *potestas*.

55. Our children, likewise, whom we have begotten in lawful marriage<sup>2</sup>, are in our *potestas*; and this right is one peculiar to Roman citizens. For there are scarcely any other men who have over their children a *potestas* such as we have. And this the late emperor Hadrian remarked in an edict which he published with regard to those who asked him for Roman citizenship for themselves and their children. I am not, however, unaware of the fact, that the race of the Galatians think that children are in the *potestas* of their ascendants.

<sup>1</sup> II. 40, 41.

<sup>2</sup> By *justae* or *legitimae nuptiae* is meant a marriage contracted and established by the special forms prescribed by the *jus civile*: by *non justae nuptiae*, on the other hand, is not necessarily meant an illegal mar-

riage, for this sometimes denotes the contract which, though not completed according to all the prescribed forms of the *jus civile*, is valid according to the *jus gentium*. This was an important distinction in reference to the *causae probatio*.

56. *Habent autem in potestate liberos cives Romani*, si cives Romanas uxores duxerint, vel etiam Latinas peregrinasve cum quibus conubium habeant. cum enim conubium id efficiat, ut liberi patris condicionem sequantur, evenit ut non *solum* cives Romani fiant, set *et* in potestate patris sint. (57.) Unde et veteranis quibusdam concedi solet principalibus constitutionibus conubium cum his Latinis peregrinisve quas primas post missionem uxores duxerint. et qui ex eo matrimonio nascuntur, et cives Romani et in potestatem parentum fiunt.

58. *Sciendum autem est non omnes nobis uxores ducere licere*: nam a quarundam nuptiis abstinere debemus.

56. Roman citizens then have their children in their *potestas*, if they have married Roman citizens or even Latin or foreign women with whom they have *conubium*<sup>1</sup>. For since *conubium* has the effect of making children follow the condition of their father, the result is that they are not only Roman citizens by birth, but are also under their father's *potestas*. 57. Hence by the Imperial constitutions there is often granted to certain classes of veterans *conubium* with such Latin or foreign women as they take for their first wives after their dismissal from service; and the children of such a marriage are both Roman citizens and in the *potestas* of their ascendants<sup>2</sup>.

58. Now we must bear in mind that we may not marry any woman we please, for there are some from marriage<sup>3</sup> with whom we must refrain.

<sup>1</sup> Conubium est uxoris ducendae facultas. Conubium habent cives Romani cum civibus Romanis; cum Latinis autem et peregrinis ita si concessum sit: cum servis nullum est conubium. Ulpian, v. 3—5. The double aspect of *conubium*, viz. as it affected *status*, and as it related to degrees of relationship, also had an important bearing on the *causae probatio*; as far as the former is concerned, *conubium* existed as an undisputed right between all free persons, but only as a privilege (and therefore requiring proof) between Latins and foreigners.

<sup>2</sup> Gaius does not here tell us what were the rights of a father having

*patria potestas*. Originally no doubt the *potestas* over sons was the same as over slaves, including the power of life and death, and the right to all property which the son acquired. The former power gradually fell into abeyance, and the latter in the case of sons was infringed upon by the rules which sprang up regarding *peculium castrense* and *quasi-castrense*, for which see D. 14. 6. 2, and Sandars' *Justinian*, p. 239. Read also Maine, pp. 135—146.

<sup>3</sup> *Nuptiae* and *matrimonium* seem to be used indiscriminately by Gaius. *Nuptiae* properly would be the ceremonies of marriage, *matrimonium* the marriage itself.

59. Inter eas enim personas quae parentum liberorumve locum inter se optinent nuptiae contrahi non possunt, nec inter eas conubium est, velut inter patrem et filiam, *vel* matrem et filium, *vel* avum et neptem: et si tales personae inter se coierint, nefarias *atque incestas nuptias contraxisse dicuntur. et haec* adeo ita sunt, ut quamvis per adoptionem parentum liberorumve loco sibi esse coeperint, non possint inter se matrimonio coniungi, in tantum, ut et dissoluta adoptione idem iuris maneat: itaque eam quae nobis adoptione filiae aut neptis loco esse coeperit non poterimus uxorem ducere, quamvis eam emancipaverimus.

60. Inter eas quoque personas quae ex transverso gradu cognatione iunguntur est quaedam similis observatio, sed non tanta. (61.) Sane inter fratrem et sororem prohibitae sunt nuptiae, sive eodem patre eademque matre nati fuerint, sive alterutro eorum. sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem constat adoptio, sane inter me et

59. Thus between persons who stand to one another in the relation of ascendants and descendants, marriage cannot be contracted, nor is there *conubium* between them, for instance, between father and daughter, or mother and son, or grandfather and granddaughter; and if such persons cohabit, they are said to have contracted an unholy and incestuous marriage. And these rules hold so universally, that although they enter into the relation of ascendants and descendants by adoption, they cannot be united in marriage; so that even if the adoption have been dissolved the same rule stands: and therefore we cannot marry a woman who has come to be our daughter or granddaughter by adoption, even though we have emancipated her<sup>1</sup>.

60. Between persons also who are related collaterally there is a rule of like character, but not so stringent<sup>2</sup>. 61. Marriage is certainly forbidden between a brother and a sister, whether they be born from the same father and the same mother, or from one or other of them<sup>3</sup>. But if a woman become my sister by adoption, so long as the adoption stands, marriage certainly cannot subsist between us; but when the adoption

<sup>1</sup> Ulpian, v. 6.

<sup>2</sup> Ibid.

<sup>3</sup> *i. e.* Whether they be of the whole or half blood.



eam nuptiae non possunt consistere; cum vero per emancipationem adoptio dissoluta sit, potero eam uxorem ducere; set *et* si ego emancipatus fuero, nihil inpedimento erit nuptiis.

62. Fratris filiam uxorem ducere licet: idque primum in usum venit, cum divus Claudius Agrippinam, fratris sui filiam, uxorem duxisset. sororis vero filiam uxorem ducere non licet. et haec ita principalibus constitutionibus significantur. Item amitam et materteram uxorem ducere non licet.

63. Item eam quae *nobis quondam* *socrus* aut *nurus* aut *pri-vigna* aut *noverca* fuit. *ideo autem* diximus *quondam*, quia si adhuc constat eae nuptiae per quas talis adfinitas quaesita est, alia ratione *inter nos* nuptiae esse non possunt, quia neque eadem duobus nupta esse potest, neque idem duas uxores, habere.

64. Ergo si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere videtur, neque liberos. *hi enim* qui ex eo coitu nascuntur, matrem quidem habere videntur, patrem vero

has been dissolved by emancipation<sup>1</sup>, I can marry her: and moreover if I have been emancipated there will be no bar to the marriage.

62. It is lawful to marry a brother's daughter, and this first came into practice when Claudius took to wife Agrippina, the daughter of his brother<sup>2</sup>. But it is not lawful to marry a sister's daughter. And these things are so laid down in constitutions of the emperors. Likewise it is unlawful to marry a father's or mother's sister.

63. Likewise one who has aforetime been our mother-in-law or daughter-in-law or step-daughter or step-mother. The reason for our saying "aforetime" is that if the marriage still subsists whereby such affinity has been brought about, marriage between us is impossible for another reason, since neither can the same woman be married to two husbands, nor can the same man have two wives.

64. If then any man has contracted an unholy and incestuous marriage, he is considered as having neither wife nor children. For the offspring of such a cohabitation are regarded as having a mother indeed, but no father at all: and hence they

<sup>1</sup> I. 132.

<sup>2</sup> This connection was again prohibited by Justinian, see *Inst.* I. 10, § 3.



non utique: nec ob id in potestate eius sunt, *sed* quales sunt ii quos mater vulgo concepit. *nam nec hi* patrem habere *omnino* intelleguntur, cum *his etiam* incertus sit; unde solent spurii filii appellari, vel a Graeca voce quasi *σποράδην* concepti, vel quasi sine patre filii.

65. *Aliquando autem evenit, ut liberi qui statim ut nati sunt* parentum in potestate non fiant, ii postea tamen redigantur in potestatem. (66.) Itaque *si Latinus* ex lege Aelia Sentia uxore ducta filium procreaverit, aut Latinum ex Latina, aut civem Romanum ex cive Romana, non habebit eum in potestate *at causa probata civitatem Romanam consequitur cum filio*: simul ergo eum in potestate sua habere incipit.

67. Item si civis Romanus Latinam aut peregrinam uxorem duxerit per ignorantiam, cum eam civem Romanam esse crederet, et filium procreaverit, hic non est in potestate, quia ne quidem civis Romanus est, sed aut Latinus aut peregrinus, id

are not in his *potestas*, but are as those whom a mother has conceived out of wedlock. For these too are considered to have no father at all, inasmuch as in respect of them also he is uncertain: and therefore they are called spurious children, either from a Greek word, being as it were conceived *σποράδην* (at random), or as children without a father<sup>1</sup>.

65. Sometimes, however, it happens that descendants, who at the moment of their birth are not in the *potestas* of their ascendants, are subsequently brought under their *potestas*. 66. For instance, if a Latin, having married a wife in accordance with the Lex Aelia Sentia, have begotten a son, whether a Latin son by a Latin wife or a Roman citizen by a Roman wife, he will not have him in his *potestas*, but when his case has been proved<sup>2</sup>, he and his son together attain to Roman citizenship: and therefore at the same instant he will begin to have him in his *potestas*.

67. Likewise if a Roman citizen through ignorance have married a Latin or a foreign woman, believing her to be a Roman citizen, and have begotten a son, this son is not in his *potestas*, because he is not even a Roman citizen, but either a Latin or a foreigner, that is, of the condition of which his

<sup>1</sup> Ulpian, IV. 2. *Sinepatrii* according to the second derivation is contracted down into *spurii*.

<sup>2</sup> L. 29. Ulp. VII. 4.

est eius condicionis cuius et mater fuerit, quia non aliter quisquam ad patris condicionem accedit, quam si inter patrem et matrem eius conubium sit: sed ex senatusconsulto permittitur causam erroris probare, et ita uxor quoque et filius ad civitatem Romanam perveniunt, et ex eo tempore incipit filius in potestate patris esse. Idem iuris est, si eam per ignorantiam uxorem duxerit quae dediticiorum numero est, nisi quod uxor non fit civis Romana. (68.) Item si civis Romana per errorem nupta sit peregrino tamquam civi Romano, permittitur ei causam erroris probare, et ita filius quoque et maritus ad civitatem Romanam perveniunt, et aequae simul incipit filius in potestate patris esse. Idem iuris est si peregrino tamquam Latino ex lege Aelia Sentia nupta sit: nam et de hoc specialiter senatusconsulto cavetur. Idem iuris est aliquatenus, si ei qui dediticiorum numero est, tamquam civi Romano aut Latino ex lege Aelia Sentia nupta sit: nisi quod scilicet qui dediticiorum nu-

mother is, since a man does not follow his father's condition unless there be *conubium* between his father and mother: yet by a *senatusconsultum*<sup>1</sup> he is allowed to prove a cause of error, and so both the wife and son attain to Roman citizenship, and from that time the son begins to be in the *potestas* of his father. The rule is the same if through ignorance he marry a woman who is in the category of the *dediticii*, except that the wife does not become a Roman citizen<sup>2</sup>. 68. Likewise if a Roman woman by mistake be married to a foreigner thinking him to be a Roman citizen, she is allowed to prove a cause of error<sup>3</sup>, and thus both the son and the husband attain to Roman citizenship, and at the same time the son begins to be in his father's *potestas*. The rule is the same, if she be married in accordance with the Lex Aelia Sentia to a foreigner under the impression that he is a Latin, for as to this special provision is made by the *senatusconsultum*<sup>4</sup>. The rule is the same to some extent, if she be married in accordance with the Lex Aelia Sentia to one who is in the category of the *dediticii*, under the impression that he is a Roman citizen or a Latin, except, that is to say, that he who is in the category of the *dediticii* remains

<sup>1</sup> Temp. Vespasiani, according to Gans.

<sup>2</sup> l. 15. 26, 27.

<sup>3</sup> Ulp. VII. 4.

<sup>4</sup> l. 67.

mero est, in sua condicione permanet, et ideo filius, quamvis fiat civis Romanus, in potestatem patris non redigitur. (69.) Item si Latina peregrino, quem Latinum esse crederet, nupserit, potest ex *senatusconsulto* filio nato causam *erroris probare*, et ita omnes fiunt cives Romani, et filius in potestate patris esse incipit. (70.) *Idem iuris omnino est*, si Latinus per errorem peregrinam quasi Latinam aut civem Romanam e lege Aelia Sentia uxorem duxerit. (71.) Praeterea si civis Romanus, qui se credidisset Latinum, duxisset Latinam, permittitur ei filio nato erroris causam *probare*, tamquam si ex lege Aelia Sentia uxorem duxisset. Item his qui licet cives Romani essent, peregrinos se esse credidissent et peregrinas uxores duxissent, permittitur ex *senatusconsulto* filio nato causam erroris probare: quo facto peregrina uxor civis Romana fit et filius quoque ita non solum ad civitatem Romanam pervenit, sed etiam in potestatem patris redigitur. (72.) Quaecumque de filio esse diximus, eadem et de filia dicta intellegemus. (73.) Et quantum ad erroris causam probandam attinet, nihil interest cuius aetatis filius

in his condition, and therefore the son, although he is a Roman citizen by birth, is not brought under his father's *potestas*. 69. Likewise if a Latin woman be married to a foreigner, thinking him to be a Latin, she can, by virtue of the *senatusconsultum*, after a son is born, prove a cause of error, and so they all become Roman citizens, and the son is at once in his father's *potestas*. 70. The same rule holds in every respect if a Latin by mistake marry a foreign woman in accordance with the Lex Aelia Sentia, under the impression that she is a Latin or a Roman citizen. 71. Further, if a Roman citizen, who believed himself to be a Latin, have married a Latin woman, he is permitted, after the birth of a son to prove a cause of error, just as though he had married in accordance with the Lex Aelia Sentia. Likewise men, who, although they were Roman citizens, believed themselves to be foreigners and married foreign wives, are allowed by the *senatusconsultum*, after the birth of a son, to prove a cause of error: and on this being done the foreign wife becomes a Roman citizen, and the son also in this way not only attains to Roman citizenship, but is brought under the *potestas* of his father. 72. Whatever we have said of a son, we shall consider to be also said of a daughter. 73. And so far as regards the proving of a cause

— — — — — Latinus — — —  
 — qui — — — — — nisi minor anniculo sit filius filiae,  
 causa probari non potest. nec me praeterit in aliquo rescripto  
 divi Hadriani ita esse constitutum, tamquam quod ad erroris  
 quoque *causam* probandam [*desunt* 2. *lin.*] Imperator — — —  
 tuendam dedit. (74.) *Item* peregrino [ $3\frac{1}{2}$  *lin.*] uxorem duxisset  
 et filio nato alias civitatem Romanam consecutus esset, deinde  
 cum *quaereretur* an *causam* probare *posset*, rescripsit Imperator  
 Antoninus perinde posse eum *causam* probare, atque si pere-  
 grinus mansisset. ex quo colligimus etiam peregrinum *causam*  
 probare posse. (75.) *Ex iis* quae diximus *apparet* — errore —  
 — — — peregrinus [ $1\frac{1}{2}$  *lin.*] *quidem* — errorem — — matrimo-  
 nium — — — — — ea quae superius —  
 — — nullus error intervenerit — — — — —  
 nullo casu — — — — —

76. [2 *lin.*] uxorem duxerit, sicut supra quoque diximus,  
 iustum matrimonium contrahi et tunc ex iis qui nascitur, civis  
 Romanus est et in potestate patris erit. (77.) Itaque si civis

of error, it matters not of what age the son or daughter  
 be<sup>1</sup>..... 74. Likewise in the case of a foreigner...(who)  
 had married, and after the birth of his son had obtained Roman  
 citizenship in some other way, when afterwards the question  
 was raised whether he could prove a cause of error, the  
 emperor Antoninus declared in a rescript that he could as well  
 prove a cause as if he had remained a foreigner. Whence we  
 gather that a foreigner too can prove a cause of error.

75. ....

76. ....<sup>2</sup> has married,...as we also said above, a lawful  
 marriage is contracted, and then the child of such parents is a  
 Roman citizen and in the *potestas* of his father. 77. Like-  
 wise if a Roman woman be married to a foreigner, although

<sup>1</sup> The rest of this paragraph is corrupt, but it seems plain that Gaius goes on to say, that although in proving a cause of error the age of the child is immaterial; yet it is not so when a Junian Latin applies to the Praetor in virtue of the Lex Aelia Sentia, for his claim is not entertained unless the child is above one

year of age.

<sup>2</sup> § 75 is so corrupt that any translation of it must be mere guess-work. The commencement of § 76 is also mutilated, but obviously Gaius is speaking of the case of a Roman marrying a woman of a nation with which there is *conubium*. See I. 56.

Romana peregrino nupserit, is qui nascitur, licet omni modo peregrinus sit, tamen interveniente conubio iustus filius est, tamquam si ex peregrina eum procreasset. hoc tamen tempore e senatusconsulto quod auctore divo Hadriano factum est, etsi non fuerit conubium inter civem Romanam et peregrinum, qui nascitur iustus patris filius est. (78.) Quod autem diximus inter civem Romanam peregrinumque matrimonio contracto eum qui nascitur, peregrinum [desunt 11 lin.]. (79.) Adeo autem hoc ita est, ut [desunt 3 lin.] sed etiam, qui Latini nominantur: sed ad alios Latinos pertinet, qui proprios populos propriasque civitates habebant et erant peregrinorum numero. (80.) Eadem ratione ex contrario ex Latino et cive Romana qui nascitur, civis Romanus nascitur. fuerunt tamen qui putaverunt ex lege Aelia Sentia contracto matrimonio Latinum nasci, quia videtur

the child is in every case a foreigner, yet if *conubium* exist between his parents, he is a lawful son, as much as if the foreigner had begotten him upon a foreign woman. At the present time, however, by a *senatusconsultum* which was enacted at the instance of the late emperor Hadrian, even if *conubium* do not exist between the Roman woman and the foreigner, the child is the lawful son of his father. 78. But when we said that on a marriage taking place between a Roman woman and a foreigner, the child is a foreigner<sup>1</sup>..... 79. ....<sup>2</sup> 80. On the same principle, in the converse case, the child of a Latin man and a Roman woman is a Roman citizen by birth. Some, however, have thought that when a marriage is contracted in accordance with the Lex Aelia Sentia, the child is a Latin, because it is considered that *conubium* is granted between them in that case by the Leges Aelia Sentia and

<sup>1</sup> The rule that the child in this case should follow the condition of the father rather than that of the mother is anomalous; and Göschen conjecturally fills up the lacuna in § 78, with an explanation that a special *lex* (Mensia) had settled that the rule of the child's condition being that of the mother when no *conubium* subsisted, should in this particular instance be set aside. See Ulpian, v. 8, and D. I. 5. 24.

<sup>2</sup> This paragraph again is altogether in confusion. Probably what

is implied by it is that except in the case touched by the Lex Mensia, the child of a marriage without *conubium* follows his mother's condition by the *jus gentium*. Then follows the further explanation, that as marriages without *conubium* are all liable to this incident, it matters not whether the Latins concerned are technical Latins (Juniani), or actual Latins by birth, "alios Latinos" as Gaius terms them, who, as we now learn, were classed among the foreigners.

eo casu per legem Aeliam Sentiam et Iuniam conubium inter eos dari, et semper conubium efficit, ut qui nascitur patris condicioni accedat: aliter vero contracto matrimonio eum qui nascitur iure gentium matris condicionem sequi. at vero hodie civis Romanus est; scilicet hoc iure utimur ex senatusconsulto, quo auctore divo Hadriano significatur, ut *omni modo* ex Latino et cive Romana natus civis Romanus nascatur. (81.) His convenienter etiam illud senatusconsulto divo Hadriano auctore significatur, ut ex Latino *et* peregrina, item contra ex peregrino *et* Latina qui nascitur, matris condicionem sequatur. (82.) Illud quoque his conveniens est, quod ex ancilla et libero iure gentium servus nascitur, et ex libera et servo liber nascitur. (83.) Animadvertere tamen debemus, ne iuris gentium regulam vel lex aliqua vel quod legis vicem optinet, aliquo casu commutaverit. (84.) Ecce enim ex senatusconsulto Claudiano poterat civis Romana quae alieno servo volente domino eius

Junia, and *conubium* always has the effect that the child follows the condition of the father<sup>1</sup>: but that when the marriage is contracted in any other way the child by the *jus gentium* follows the condition of the mother. Nowadays, however, he is a Roman: inasmuch as we adopt this rule by reason of a *senatusconsultum*, in which at the instance of the late emperor Hadrian it is laid down that the child of a Latin man and Roman woman is in every case a Roman citizen by birth. 81. Agreeably to these principles this rule is also stated in the *senatusconsultum* (passed) at the instance of the late emperor Hadrian<sup>2</sup>, that the child of a Latin man and a foreign woman, and conversely of a foreign man and a Latin woman, follows the condition of his mother. 82. With these principles too agrees the rule, that the child of a slave woman and a free man is a slave by birth by the *jus gentium*, and that the child of a free woman and a slave man is a free man by birth<sup>3</sup>. 83. We ought, however, to be on our guard lest any *lex*, or anything equivalent to a *lex*, may have changed in any instance the rule of the *jus gentium*. 84. Thus, for example, by a *senatusconsultum* of Claudius, a Roman woman who cohabited with another person's slave with the master's consent, might herself

30, 56, 67. Ulpian, v. 8.

<sup>2</sup> l. 66.

<sup>3</sup> Ulp. v. 9.

coiit, ipsa ex pactione libera permanere, sed servum procreare : nam quod inter eam et dominum istius servi convenerit, ex senatusconsulto ratum esse iubetur. sed postea divus Hadrianus iniquitate rei et inelegantia iuris motus restituit iuris gentium regulam, ut cum ipsa mulier libera permaneat, liberum pariat. (85.) Ex lege.....ex ancilla et libero poterant liberi nasci : nam ea lege cavetur, ut si quis cum aliena ancilla quam credebat liberam esse coierit ; si quidem masculi nascantur, liberi sint, si vero feminae, ad eum pertineant cuius mater ancilla fuerit. sed et in hac specie divus Vespasianus inelegantia iuris motus restituit iuris gentium regulam, ut omnimodo, etiam si masculi nascantur, servi sint eius cuius et mater fuerit. (86.) Sed illa pars eiusdem legis salva est, ut ex libera et servo alieno, quem sciebat servum esse, servi nascantur.

by special agreement remain free, and yet bear a slave<sup>1</sup>; for whatever was agreed upon between her and the master of that slave, was by the *senatusconsultum* ordered to be binding. But afterwards, the late emperor Hadrian, moved by the want of equity in the matter and the anomalous character of the rule<sup>2</sup>, restored the regulation of the *jus gentium* that when the woman herself remains free, the child she bears shall also be free. 85. By the Lex<sup>3</sup>..... the children of a slave woman and a free man might be born free : for it is provided by that *lex* that if a man cohabited with another person's slave, whom he imagined to be free, the children, if males, should be free ; if females, should belong to him whose slave the mother was. But in this instance, too, the late emperor Vespasian, moved by the anomalous character of the rule, restored the regulation of the *jus gentium*, that in all cases, even if males were born, they should be the slaves of him to whom the mother belonged. 86. But the other part of the same law remains in force, that from a free woman and another person's slave whom she knew to be a slave, slaves are born. Amongst nations, therefore,

<sup>1</sup> I. 91, 160. Taciti *Ann.* XII. 53.

<sup>2</sup> See as to this word *inelegantia*, Austin, Lect. XXX. p. 231 (p. 552, third edition).

<sup>3</sup> Whether the Lex here referred to is the Lex Aelia Sentia or some later Lex, or whether it is the *Senatusconsultum* above specified, is a moot

point among commentators, but not of sufficient importance to be examined at length. It is certainly improbable that so accurate a writer as Gaius should have used Lex and *Senatusconsultum* as convertible terms.



itaque apud quos talis lex non est, qui nascitur iure gentium matris condicionem sequitur et ob id liber est.

87. Quibus autem casibus matris et non patris condicionem sequitur qui nascitur, iisdem casibus in potestate eum patris, etiamsi is civis Romanus sit, non esse plus quam manifestum est. et ideo superius rettulimus, quibusdam casibus per errorem non iusto contracto matrimonio senatum intervenire et emendare vitium matrimonii, eoque modo plerumque efficere, ut in potestatem patris filius redigatur. (88.) Sed si ancilla ex cive Romano conceperit, deinde manumissa civis Romana facta sit, et tunc pariat, licet civis Romanus sit qui nascitur, sicut pater eius, non tamen in potestatem patris est, quia neque ex iusto coitu conceptus est, neque ex ullo senatusconsulto talis coitus quasi iustus constituitur.

89. Quod autem placuit, si ancilla ex cive Romano conce-

who have no such law, the child by the *jus gentium* follows the mother's condition, and therefore is free<sup>1</sup>.

87. Now in all cases where the child follows the condition of the mother and not of the father, it is more than plain that he is not in the *potestas* of his father, even though he be a Roman citizen: and therefore we have stated above<sup>2</sup> that in certain cases, when by mistake an unlawful marriage has been contracted, the senate<sup>3</sup> interferes and makes good the flaw in the marriage, and thus generally causes the son to be brought under his father's *potestas*. 88. But if a female slave conceive by a Roman citizen, be then manumitted and made a Roman citizen, and then bear her child, although the child is a Roman citizen, just as much as his father is, yet he is not in his father's *potestas*, because he is neither born from a lawful cohabitation, nor is such a cohabitation put on the footing of a lawful one by any *senatusconsultum*.

89. The rule, however, that if a slave woman conceive by a

<sup>1</sup> The case treated of in § 84 is that of a woman cohabiting with a slave with his master's consent; the case in § 91, that of her cohabiting with the slave against the master's warning. The present case is that of there being neither warning nor express consent.

<sup>2</sup> l. 67—73.

<sup>3</sup> Senatus here meaning the Legislature by a *senatusconsultum*. The senate never interfered in cases of this sort (*erroris probatio*) directly, and as a court or body. Indirectly no doubt it did, *i. e.* by the publication of an enactment on the particular subject.



perit, deinde manumissa pepererit, qui nascitur liberum nasci, naturali ratione fit. nam hi qui illegitime concipiuntur, statum sumunt ex eo tempore quo nascuntur: itaque si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos conceperit, cum ancilla fuerit. at hi qui legitime concipiuntur, ex conceptionis tempore statum sumunt. (90.) Itaque si cui mulieri *civi Romanae praegnanti* aqua et igni *interdictum* fuerit, eoque modo peregrina fiat, et tunc pariat, conplures distinguunt et putant, si quidem ex iustis nuptiis conceperit, civem Romanum ex ea nasci, si vero volgo conceperit, peregrinum ex ea nasci. (91.) Item si qua mulier civis Romana praegnans ex senatusconsulto Claudiano ancilla facta sit ob id, quod alieno servo coierit denuntiante domino eius, conplures distinguunt et existimant, si quidem ex iustis nuptiis conceperit, civem Romanum

Roman citizen and be then manumitted and bear her child, such child is free born, is based on natural reason. For those who are conceived illegitimately take their status from the moment of birth; therefore if born from a free woman they are free, nor is it material by what man the mother conceived them when she was a slave. But those who are conceived legitimately take their status from the time of conception<sup>1</sup>. 90. Therefore if a Roman woman, whilst pregnant, be interdicted from fire and water<sup>2</sup>, and so become a foreigner, and then bear her child, many authors draw a distinction, and think that if she conceived in lawful marriage, the child born from her is a Roman citizen, whilst if she conceived out of wedlock, the child born from her is a foreigner. 91. Likewise, if a Roman woman, whilst pregnant, be reduced to slavery in accordance with the *senatusconsultum* of Claudius, because she has cohabited with another man's slave in spite of the warning of his master<sup>3</sup>, many authors draw a distinction and hold that if she conceived in lawful marriage, the child born from her is a

<sup>1</sup> Ulpian, v. 10.

<sup>2</sup> It was a rule of Roman law that no one could lose his citizenship without his own consent. The interdict from fire and water brought about the result which justice required but the law could not effect. The culprit by being debarred from the neces-

saries of life was driven to inflict on himself banishment, and with it loss of citizenship. "Id autem ut esset faciendum, non ademptione civitatis, sed tecti et aquae et ignis interdictione faciebant." Cic. *pro Dom.* 30.

<sup>3</sup> I. 84, 160.

ex ea nasci, si vero vulgo conceperit, *servum* nasci eius cuius mater facta est ancilla. (92.) *Item peregrina* quoque si vulgo conceperit, deinde civis Romana *facta sit, et pariat*, civem Romanum parit; si vero ex peregrino, *cui* secundum leges moresque peregrinorum coniuncta est, videtur ex senatusconsulto quod auctore divo Hadriano factum est peregrinus nasci, nisi patri eius civitas Romana quaesita sit.

93. Si peregrinus *cum liberis civitate Romana donatus fuerit*, non aliter filii in potestate eius fiunt, quam si Imperator eos in *potestatem* redegerit. quod ita demum is facit, si causa cognita aestimaverit hoc filiis expedire: diligentius atque exactius enim causam cognoscit de impuberibus absentibusque. et haec ita edicto divi Hadriani significantur. (94.) Item si quis cum uxore praegnante civitate Romana donatus sit, quamvis is qui nascitur, ut supra diximus, *civis Romanus sit*, tamen in potestate

Roman citizen, but if she conceived out of wedlock, he is a slave of the man to whom the mother has been made a slave. 92. Likewise if a foreign woman have conceived out of wedlock, and then be made a Roman citizen and bear her child, the child she bears is a Roman citizen: but if, on the contrary, she conceived him by a foreigner to whom she was united according to the laws and customs of foreigners, he is considered, in accordance with a *senatusconsultum* which was made at the instance of the late emperor Hadrian, to be born a foreigner, unless Roman citizenship has been obtained by his father.

93. If a foreigner, and his children with him, be presented with Roman citizenship, the children are not in his *potestas*, unless the emperor has subjected them to his *potestas*<sup>1</sup>. Which he only does if, on investigation of the circumstances, he judge this expedient for the children: for he examines a case with more than ordinary care and exactness when it relates to persons under the age of puberty and to absentees. And these matters are so laid down in an edict of the late emperor Hadrian. 94. Likewise if any man, and his pregnant wife with him, be presented with Roman citizenship, although the child born is, as we have said above, a Roman citizen<sup>2</sup>, yet he is not in the *potestas* of his father: and this is laid down by a

<sup>1</sup> III. 20. Pliny, *Paneg.* c. 37.

<sup>2</sup> I. 92.

patris non fit: idque subscriptione divi Hadriani significatur. qua de causa qui intellegit uxorem suam esse praegnantem, dum civitatem sibi et uxori ab Imperatore petit, simul ab eodem petere debet, ut eum qui natus erit in potestate sua habeat. (95.) Alia causa est eorum qui Latini sunt *et* cum liberis suis ad civitatem Romanam perveniunt: nam horum in *potestate fiunt* liberi. quod ius quibusdam peregrinis [*desunt lin. 4*]. (96.) magistratum gerunt, civitatem Romanam consequuntur;

(special) rescript of the late emperor Hadrian<sup>1</sup>. Wherefore a man who knows his wife to be pregnant, when asking for citizenship for himself and his wife from the Emperor, ought at the same time to ask him that he may have the child, who shall be born, in his *potestas*. 95. The case is different with those who are Latins and with their children attain to Roman citizenship, for their children come under their *potestas*<sup>2</sup>. Which right (has been extended) to certain foreigners..... 96. When they who *discharge* the duties of a magistrate obtain Roman

<sup>1</sup> *Subscriptio* was the emperor's reply to a case laid before him, such reply having authority upon that particular point only. It was almost equal to a Rescript or *Epistola*. See note on I. 5, and Dirksen, *Manuale Latinitatis*, sub verbo, § 2.

<sup>2</sup> As stated in the note on § 22, Niebuhr held that the *majus Latium* meant the franchise of the old Latin towns: whilst the *minus Latium* was the franchise of the colonists north of the Po. The Julian law gave *civitas* to all the old Latin towns, and therefore according to Niebuhr's notion, the *majus Latium* long before Gaius' time had become obsolete; the only Latin franchise remaining being the *minus*. Mommsen, however, propounds another theory, into the proof of which our limits preclude our entering, but we may state that the conclusion he arrives at is that the two franchises were both existent in Gaius' time, that neither had anything to do with the old Latins, and that the difference between the two was that in the case of the *majus Latium* the full *civitas* was conferred on those who held office in the co-

lony, and on their wives, parents, and children; whilst in the case of the *minus Latium*, the full *civitas* was conferred on the magistrate alone and not on his relations. See Mommsen, *Die Stadtrechte der Lat. Gem. Salpens.*, and Gaius, I. 79. 131, III. 56.

With Mommsen's view of the subject agrees the account given by Appian (*de Bello Civili*, II. 26) of the settlement of the city of Novo Como by Caesar. Appian tells us the inhabitants received the *jus Latii*, and that the consequence of this was that any of the citizens who held a superior magistracy for a year obtained the Roman *civitas*. So also Asconius has a passage (in Pison. p. 3, edit. Orell.) which may be translated: "Pompey gave to the original inhabitants the *jus Latii*, so that they might have the same privilege as the other Latin colonies, viz. that their members by holding a magistracy should attain to the Roman citizenship." The passage in Livy XII. 8, refers to the old *jus Latii*, which was turned into full *civitas* by the Lex Julia, but it is well worth reading.

minus latum [*Latium?*] est, cum hi tantum qui vel magistratum vel honorem gerunt ad civitatem Romanam perveniunt. idque conpluribus epistulis Principum significatur [1 *lin.*].

97. *Non solum tamen naturales liberi, secundum ea quae diximus, in potestate nostra sunt, verum et hi quos adoptamus.*

98. Adoptio autem duobus modis fit, aut populi auctoritate, aut imperio magistratus, velut Praetoris. (99.) Populi auctoritate adoptamus eos qui sui iuris sunt: quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur an velit eum quem adoptaturus sit iustum sibi filium esse; et is qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri iubeat. Imperio magistratus adoptamus eos qui in potestate parentum sunt, sive primum gradum liberorum optineant, qualis est filius et filia, sive inferiorem, qualis est nepos, neptis, pronepos, proneptis. (100.) Et quidem illa adoptio quæ per populum fit nusquam nisi Romæ fit: at hæc

citizenship: (the franchise) is the *minus Latium* (or, is a less extensive one), when those only who hold some magistracy or office of honour attain to Roman citizenship. And this is stated in many epistles of the Emperors.

97. Now not only our actual children are in our *potestas*, according to what we have already said, but also those whom we adopt.

98. But adoption takes place in two ways, either by authority of the *populus*<sup>1</sup>, or under the jurisdiction of a magistrate, for instance the Praetor<sup>2</sup>. 99. By authority of the *populus* we adopt those who are *sui iuris*: which species of adoption is styled *arrogatio*, for he who adopts is *rogated*, i. e. is interrogated whether he wishes the man whom he is about to adopt to become his lawful son: and he who is adopted is *rogated* whether he submits to that being done: and the *populus* are *rogated* whether they order it to be done<sup>3</sup>. Under the jurisdiction of a magistrate we adopt those who are in the *potestas* of their ascendants, whether they stand in the first degree of descendants, as son or daughter, or in a lower one as grandson, granddaughter, great-grandson, great-granddaughter. 100. That adoption which is performed by authority of the *populus* takes place nowhere but at Rome: but the other is frequently

<sup>1</sup> 1. 3.

<sup>2</sup> Ulpian, VIII. 1—3.

<sup>3</sup> See Appendix (B).

etiam in provinciis apud Praesides earum fieri solet. (101.) Item per populum feminae non adoptantur; nam id magis placuit. Apud Praetorem vero vel in provinciis apud Proconsulem Legatumve etiam feminae solent adoptari.

102. Item inpuerem apud populum adoptari aliquando prohibitum est, aliquando permissum est. nunc ex epistula optimi Imperatoris Antonini quam scripsit Pontificibus, si iusta causa adoptionis esse videbitur, cum quibusdam condicionibus permissum est. apud Praetorem vero, et in provinciis apud Proconsulem Legatumve, cuiuscumque aetatis adoptare possumus.

103. Illud vero utriusque adoptionis commune est, quia et hi qui generare non possunt, quales sunt spadones, adoptare possunt. (104.) Feminae vero nullo modo adoptare possunt, quia ne quidem naturales liberos in potestate habent. (105.) Item si quis per populum sive apud Praetorem vel apud Praesidem provinciae adoptaverit, potest eundem alii in adoptionem

performed in the provinces also in the presence of their governors<sup>1</sup>. 101. Women, likewise, are not adopted by authority of the *populus*: for so it has been generally ruled. But before the Praetor or in the provinces before the Proconsul or Legate women as well as men may be adopted<sup>2</sup>. 102. Further, in some cases it has been forbidden to adopt by authority of the *populus* one under the age of puberty; in other cases it has been allowed. At the present time, according to an epistle of the excellent emperor Antoninus which he wrote to the Pontifices, if the cause of adoption appear lawful, it is allowed under certain conditions. Before the Praetor, however, or in the provinces before the Proconsul or Legate, we can adopt people of any age whatever.

103. It is a rule common to both kinds of adoption, that those who cannot procreate, as eunuchs-born, can adopt<sup>3</sup>. 104. But women cannot adopt in any way, inasmuch as they have not even their actual children in their *potestas*<sup>4</sup>. 105. Likewise, if a man adopt by authority of the *populus*, or before the Praetor or governor of a province, he can give the same person

<sup>1</sup> Ulpian, viii. 4, 5.

<sup>2</sup> 4. v, note.

<sup>3</sup> Ulpian, viii. 6.

<sup>4</sup> Ibid. 8 a.

dare. (106.) Set illa quaestio est, an minor natu maiorem natu adoptare possit: *idque* utriusque adoptionis commune est.

107. Illud proprium est eius adoptionis quae per populum fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, set etiam liberi eius in eiusdem fiunt potestate tanquam nepotes.

108. *Nunc de his personis videamus quae in manu nostra sunt.* quod et ipsum ius proprium civium Romanorum est. (109.) Sed in potestate quidem et masculi et feminae esse solent: in manum autem feminae tantum conveniunt. (110.) Olim itaque tribus modis in manum conveniebant, usu, farreo, coemptione. (111.) Usu in manum conveniebat quae anno continuo nupta perseverabat; quae enim velut annua possessione usu-

in adoption to another. 106. But it is a moot point whether a younger man can adopt an elder, and the doubt is common to both kinds of adoption<sup>1</sup>.

107. There is this one peculiarity attaching to the kind of adoption effected by authority of the *populus*, that if one who has children in his *potestas* give himself to be arrogated, not only is he himself subjected to the *potestas* of the arrogator, but his children also come into the *potestas* of the same man in the capacity of grandchildren<sup>2</sup>.

108. Now let us consider about those persons who are in our *manus*. This also is a right peculiar to Roman citizens. 109. But whereas both males and females may be in our *potestas*, females alone come into *manus*. 110. Formerly they came into *manus* in three ways, by *usus*, *farreum* or *coemptio*. 111. A woman who remained married for an unbroken year came into *manus* by *usus*: for she who was acquired, as it were, by *usucapio*<sup>3</sup> through the possession of a year, passed into the

<sup>1</sup> Justinian settled that the adoptor must be older than the adopted by 18 years ("plena pubertate"). Inst. I. 11. 4.

<sup>2</sup> Ulpian, VIII. 8. The emperor Justinian remodelled the whole law of adoption, enacting that the actual father should lose none of his rights, and be exempted from none of his duties in respect of the child given in adoption. The only exception was in the case when the

adoptor was an ascendant of the adopted. In the latter case, styled *adoptio plena*, the old law remained in force. In the other kind (*minus plena*) the adopted child had no claims on the adoptor, except that of succeeding to him in case of his intestacy, and the adoptor had no claims whatever on the adopted.

<sup>3</sup> For an explanation of *usucapio*, see II. 42 et seqq.

capiebatur, in familiam viri transibat filiaeque locum optinebat. itaque lege duodecim tabularum cautum erat, si qua nollet eo modo in manum mariti convenire, ut quotannis trinoctio abesset atque ita usum cuiusque anni interromperet. set hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitte-  
 ratum est. (112.) Farreo in manum conveniunt per quoddam genus sacrificii — — — — — in quo farreus panis adhibetur : unde etiam confarreatio dicitur. sed complura praeterea huius iuris ordinandi gratia cum certis et sollemnibus verbis, praesentibus decem testibus aguntur et fiunt. quod ius etiam nostris temporibus in usu est : nam flamines maiores, id est Diales, Martiales, Quirinales, sicut reges sacrorum, nisi sint confarreatis nuptiis nati, inaugurari non videmus — confarreatio — — — — — (113.) Coemptio in manum conveniunt

family of her husband, and gained the position of a daughter. Therefore it was provided by a law of the Twelve Tables<sup>1</sup>, that if any woman was unwilling to come under her husband's *manus* in this way, she should every year absent herself for the space of three (successive) nights, and so break the *usus* of each year. But all these regulations have been in part removed by enactments, in part abolished by mere disuse.  
 112. Women come into *manus* by *farreum* through a particular kind of sacrifice<sup>2</sup>.....in which a cake of fine flour (*far*) is employed: whence also the proceeding is called *confarreatio*: but besides this there are many other ceremonies performed and done for the purpose of ratifying the ordinance, with certain solemn words used, and with ten witnesses present. This rite is in use even in our times, for we see that the superior *flamens*, i. e. the Diales, Martiales and Quirinales, as being supreme in sacred matters, are not admitted to office, unless they are born from a marriage by *confarreatio*<sup>3</sup>..... 113. Women come into *manus* by *coemptio* by means of a *mancipatio*<sup>4</sup>, i. e. by

<sup>1</sup> Tab. vi. l. 4.

<sup>2</sup> Ulpian, ix. Servius thus describes a part of the ceremony used in the marriage of a Flamen and Flaminica. "Two seats were joined together and covered with the skin of a sheep that had been sacrificed; then the couple were introduced en-

veloped in a veil, and made to take their seats there, and the woman, to use Dido's words, was said to be *locata* to her husband." See Servius on *Aen.* iv. 104, 357.

<sup>3</sup> Tacit. *Ann.* iv. 16.

<sup>4</sup> l. 119.



per mancipationem, *id est* per quandam imaginariam venditionem, *adhibitis* non minus quam v testibus, civibus Romanis puberibus, item libripende, *asse is sibi emit* mulierem, cuius in manum convenit. (114.) Potest autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo: *unde* aut matrimonii causa facta coemptio dicitur, aut fiducia causa. *quae* enim cum marito suo facit coemptionem, aput cum filiae loco sit, dicitur matrimonii causa fecisse coemptionem: *quae* vero alterius rei causa facit coemptionem *cum viro suo aut* cum extraneo, velut tutelae evitandae causa, dicitur fiduciae causa fecisse coemptionem. (115.) Quod est tale: si qua velit quos habet tutores reponere, ut alium nansciscatur, *iis auctoribus* coemptionem facit; deinde a coemptionatore re-

a kind of imaginary sale, in the presence of not less than five witnesses, Roman citizens of the age of puberty, as well as a *libripens*<sup>1</sup>, (wherein) he into whose *manus* the woman is coming buys her for himself with an *as*. 114. But a woman can make a *coemptio* not only with her husband, but also with a stranger: whence a *coemptio* is said to be made either with intent of matrimony or with fiduciary intent. For she who makes a *coemptio* with her husband, to be to him in the place of a daughter, is said to make *coemptio* with the intent of matrimony; but she who makes a *coemptio* with her husband or a stranger for any other purpose, for instance to get rid of her guardian, is said to have made *coemptio* with fiduciary intent<sup>2</sup>. 115. This is effected as follows: if a woman wish to get rid of the guardians she has, in order to obtain another, she makes a *coemptio* with their authorization: then being retransferred through *mancipatio* by the *coemptionator* to such person as she

<sup>1</sup> I. 119.

<sup>2</sup> Guardianship (*tutela*) is treated of in I. 142—200, without a knowledge of which it is difficult to understand this paragraph. The law, as we know, allowed the woman to do no act without the sanction of her guardians, so that even her repudiation of them required authorization on their part: although if they were unfit for their office, and yet vexatiously refused to allow a transfer, the Praetor would, as in other cases where they refused to carry

out the woman's wishes, interfere and compel them (I. 190). The guardian, then, sells the woman to the *coemptionator* by *mancipatio*. The *coemptionator* has her in his *manus*, and by a second *mancipatio* he transfers her into the *mancipium* of the person she desires to have as guardian (I. 123). From the *mancipium* she is freed by emancipation, and so, by mere operation of law (I. 166) at once has the manumittor as her "tutor fiduciarius."



mancipata ei cui ipsa velit, et ab eo vindicta manumissa, incipit eum habere tutorem, a quo manumissa est: qui tutor fiduciarius dicitur, sicut inferius apparebit. (115 a.) Olim etiam testamenti faciendi gratia *fiduciaria* fiebat coemptio. tunc enim non aliter feminae testamenti faciendi ius habebant, exceptis quibusdam personis, quam si coemptionem fecissent remancipataeque et manumissae fuisset. set hanc necessitatem coemptionis faciendae ex auctoritate divi Hadriani senatus remisit. — — — — femina — — — — (115 b.)

autem mulier fiduciae causa cum viro suo fecerit

nihilominus filiae loco incipit esse: nam si omnino qualibet ex causa uxor in manu viri sit, placuit eam iura filiae nancisci.

116. Superest ut exponamus quae personae in mancipio sint. (117.) Omnes igitur liberorum personae, sive masculini sive

pleases, and by him manumitted by *vindicta*, she thenceforth has for guardian him by whom she was manumitted; and he is called a fiduciary tutor, as will appear below. 115 a. In ancient times a fiduciary *coemptio* took place also for the purpose of making a testament<sup>1</sup>. For then women had no right of making a testament (certain persons excepted), unless they had made a *coemptio*, been retransferred by *mancipatio*<sup>2</sup>, and manumitted. But the senate, at the instance of the late emperor Hadrian, abolished this necessity of making a *coemptio*..... 115 b. But even if it be for fiduciary purpose that a woman has made a *coemptio* with her husband, she is nevertheless at once in the place of a daughter to him: for if in any case and for any reason a woman be in the *manus* of her husband, it is held that she obtains the rights of a daughter<sup>3</sup>.

116. It now remains for us to explain what persons are in *mancipium*. 117. All descendants, then, whether male or

<sup>1</sup> In ancient times the *agnati* were heirs at-law to a woman, and their succession could not be directly set aside. The method adopted was to break the agnatic bond by removing the woman from her family by the process described in the text. She then stood alone in the world: "caput et finis familiae," and having no *agnati* to prefer a claim against her, could freely dispose of her pro-

perty. III. 9—14. Cic. *pro Mur.* c. 12.

<sup>2</sup> *Remancipata* is the technical word for a woman mancipated out of *manus*. "Remancipatam Gallus Aelius ait quae remancipata sit ab eo cui in manum convenerit." Festus sub verb.

<sup>3</sup> On this subject generally see Mommsen's *History of Rome* (Dickson's translation), Vol. I. p. 62.

*feminini sexus, quae* in potestate parentis sunt, mancipari ab hoc eodem modo possunt, quo etiam servi mancipari possunt. (118.) Idem iuris est in earum personis quae in manu sunt. nam feminae a coemptionatoribus eodem modo possunt *mancipari quo liberi a parente mancipantur*; adeo quidem, *ut quamvis ea sola* aput coemptionatorem filiae loco sit *quae ei* nupta sit, *tamen* nihilo minus etiam quae ei nupta non sit, nec ob id filiae loco sit, ab eo mancipari possit. (118 a.) Plerumque solum et a parentibus et a coemptionatoribus mancipantur, cum velint parentes coemptionatoresque *e* suo iure eas personas dimittere, sicut inferius evidentius apparebit. (119.) Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam venditio: quod et ipsum ius proprium civium Romanorum est. eaque res ita agitur. adhibitis non minus *quam* quinque testibus civibus Romanis puberibus, et praeterea alio eiusdem condicionis qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit rem, *acs* tenens ita dicit: HUNC EGO

female, who are in the *potestas* of an ascendant, may be mancipated by him in the same manner in which slaves also can be mancipated. 118. The same rule applies to persons who are in *manus*. For women may be mancipated by their *coemptionators* in the same manner in which descendants are mancipated by an ascendant: and so universally does this hold, that although that woman alone who is married to her *coemptionator* stands in the place of a daughter to him, yet one also who is not married to him and so does not stand in the place of a daughter to him, can nevertheless be mancipated by him. 118 a. But generally persons are mancipated, whether by ascendants or *coemptionators*, only when the ascendants or *coemptionators* wish to dismiss them from their power, as will be seen more clearly below<sup>1</sup>. 119. Now *mancipatio*, as we have said above<sup>2</sup>, is a kind of imaginary sale: and this legal form too is one peculiar to Roman citizens. It is conducted thus: not less than five witnesses being present, Roman citizens of the age of puberty, and another man besides of like condition who holds a copper balance, and is called a *libripens*, he who receives the thing in *mancipium* takes a coin in his hand and says as follows: "I assert this man to be mine *ex jure*

<sup>1</sup> L. 132.

<sup>2</sup> L. 113.

HOMINEM EX IURÆ QUIRITIUM MEUM ESSE AIO, ISQUE MIHI EMPTUS EST HOC AERE AFNEAQUE LIBRA: deinde aere percutit libram, idque aes dat ei a quo mancipio accipit, quasi pretii loco. (120.) Eo modo et serviles et liberae personae mancipantur. animalia quoque quae mancipi sunt quo in numero habentur boves, equi, muli, asini; item praedia tam urbana quam rustica quae et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari. (121.) In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae serviles et liberae, item animalia quae mancipi sunt, nisi in praesentia sint, mancipari non possunt: adeo quidem, ut eum *qui* mancipio accipit adprehendere id ipsum quod ei mancipio datur necesse sit: unde etiam mancipatio dicitur, quia manu res capitur. praedia vero absentia solent mancipari. (122.) Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur; et erant asses, dupondii, semisses et *quadrantes*, nec ullus aureus vel argenteus

*Quiritium*<sup>1</sup>: and he has been bought by me by means of this coin and copper balance:" then he strikes the balance with the coin, and gives the coin, as though by way of price, to him from whom he receives the thing in *mancipium*. 120. In this manner persons, both slaves and free, are mancipated. So also are animals which are *res mancipi*<sup>2</sup>, in which category are reckoned oxen, horses, mules, asses; likewise such estates, with or without houses on them<sup>3</sup>, as are *res mancipi*, of which kind are those in Italy, are mancipated in the same manner. 121. In this respect only does the mancipation of estates differ from that of other things, that persons, slave and free, and likewise animals which are *res mancipi*, cannot be mancipated unless they are present; and so strictly indeed is this the case, that it is necessary for him who takes the thing in *mancipium* to grasp that which is so given to him in *mancipium*: whence the term mancipation is derived, because the thing is taken with the hand: but estates can be mancipated when at a distance<sup>4</sup>. 122. The reason for employing the coin and balance is that in olden times men used a copper coinage only, and there were *asses*, *dupondii*, *semisses*, and *quadrantes*, nor was any coinage of

<sup>1</sup> II. 40, 41.

<sup>2</sup> II. 15.

<sup>3</sup> Ulpian, XIX. 1.

<sup>4</sup> But a sod, a brick or a tile must be brought to be handled.

*in usu erat, sicut ex lege XII tabularum intellegere possumus; eorumque nummorum vis et potestas non in numero erat, sed in pondere nummorum. veluti asses librales erant, et dipondii tum erant bilibres; unde etiam dipondius dictus est quasiduo pondo: quod nomen adhuc in usu retinetur. semisses quoque et quadrantes pro rata scilicet portione librarum aeris habebant certum pondus. item qui dabant olim pecuniam non adnumerabant eam, sed appendebant. unde servi quibus permittitur administratio pecuniae dispensatores appellati sunt et adhuc appellantur. (123.) Si tamen quaerat aliquis, quare vero coemptione etiam mancipatis distet: ea quidem quae coemptionem facit, non deducit in servilem condicionem, a*

gold or silver in use, as we may see from a law of the Twelve Tables<sup>1</sup>: and the force and effect of this coinage was not in its number but its weight. For instance the *asses* weighed a pound each, and the *dipondii* two; whence the name *dipondius*, as being *duo pondo*; a name which is still employed. The *semisses* (half-asses) and *quadrantes* (quarter-asses) had also a definite weight, according to their fractional part of the pound of copper. Those, likewise, who gave money in the olden times did not count it out, but weighed it<sup>2</sup>; and thus slaves who have the management of money entrusted to them were called *dispensatores* (weighers out), and are still so called. 123. But if any one should inquire in what respect a woman purchased in *coemptio* by a husband differs from those who are mancipated<sup>3</sup>: (it is that) a woman who makes a *coemptio* is not reduced to the condition of a slave, whilst those mancipated by

<sup>1</sup> Probably Tab. II. l. 1.

<sup>2</sup> Isidor. Orig. XVI. c. 24.

<sup>3</sup> When a free person is transferred from *potestas*, or as in the present case from *manus*, by *mancipatio*, the authority appertaining to the purchaser is neither *potestas* nor *manus*, but *mancipium*. The person has been sold, as though he were a slave, and after the sale is "in servi loco," and although the slavery is fictitious and free from most of the incidents of real slavery, yet that mentioned in the text with regard to his appointment as heir remains. The

full signification of his "being ordered to be free," will be better understood after reading II. 186, 187, &c.

Read notes on I. 132, 133, and see I. 138.

The reading proposed by Huschke is adopted: "Quare vero coemptione etiam mancipatis distet," instead of Gneist's: "Quare citra coemptionem feminae etiam mancipantur." Huschke says with truth that no satisfactory meaning can be got out of the latter.

*parentibus vero et a coemptionatoribus* mancipati mancipataeve servorum loco constituuntur, adeo quidem, ut ab eo cuius in mancipio sunt neque hereditatem neque legata aliter capere possint, quam *si* simul eodem testamento liberi esse iubeantur, sicuti iuris est in persona servorum. sed differentiae ratio manifesta est, cum a parentibus et a coemptionatoribus iisdem verbis mancipio accipiuntur quibus servi; quod non similiter fit in coemptione.

124. Videamus nunc, quibus modis ii qui alieno iuri subiecti sunt eo iure liberentur. (125.) Ac prius de his dispiciamus qui in potestate sunt. (126.) Et quidem servi quemadmodum potestate liberentur, ex his intellegere possumus quae de servis manumittendis superius exposuimus.

127. Hi vero qui in potestate parentis sunt mortuo eo sui iuris fiunt. Sed hoc distinctionem recipit. nam mortuo patre sane omnimodo filii filiaeve sui iuris efficiuntur. mortuo vero avo non omnimodo nepotes neptesque sui iuris fiunt, sed ita, si post mortem avi in patris sui potestatem recasuri non sunt. *it.*

parents and coemptionators are brought into that condition, so that they can neither take an inheritance nor legacies from him in whose *mancipium* they are, unless they be also ordered in the testament to be free, as is the case with slaves. But the reason of the difference is plain, inasmuch as they are received in *mancipium* from the parents and coemptionators with the same form of words as slaves are: which is not the case in a

124. Now let us see by what means those who are subject to the authority of another are set free from that authority.

125. And first let us discuss the case of those who are under *potestas*. 126. How slaves are freed from *potestas* we may learn from the explanation of the manumission of slaves which we gave above<sup>1</sup>.

127. But those who are in the *potestas* of an ascendant become *sui iuris* on his death. This, however, admits of a qualification<sup>2</sup>. For, undoubtedly, on the death of a father sons and daughters in all cases become *sui iuris*: but on the death of a grandfather grandsons and granddaughters do not become

1. 13, &c.

<sup>2</sup> Ulpian, x. 2.

si moriente avo pater eorum et vivat et in *potestate* patris fuerit, tunc post *obitum avi* in *potestate* patris sui fiunt: si vero is, quo tempore avus moritur, aut iam mortuus est, aut exiit de *potestate* patris, tunc hi, quia in *potestatem* eius cadere non possunt, sui iuris fiunt. (128.) Cum autem is cui ob aliquod maleficio ex lege poenali aqua et igni interdicitur civitatem Romanam amittat, sequitur, ut qui eo modo ex numero civium Romanorum tollitur, proinde ac mortuo eo desinant liberi in *potestate* eius esse: nec enim ratio patitur, ut peregrinae conditionis homo civem Romanum in *potestate* habeat. Pari ratione et si ei qui in *potestate* parentis sit aqua et igni interdictum fuerit, desinit in *potestate* parentis esse, quia aequae ratio non patitur, ut peregrinae conditionis homo in *potestate* sit civis Romani parentis.

129. Quod si ab hostibus captus fuerit parens, quamvis ser-

*sui iuris* in all cases, but only if after the death of the grandfather they will not relapse into the *potestas* of their father. Therefore, if at the grandfather's death, their father be alive and in the *potestas* of his father, then after the death of the grandfather they come under the *potestas* of their father: but if at the time of the grandfather's death, the father either be dead or have passed from the *potestas* of his father, then the grandchildren, inasmuch as they cannot fall under his *potestas*, become *sui iuris*. 128. Again, since he who is interdicted from fire and water for some crime under a penal law loses his Roman citizenship<sup>1</sup>, it follows that the descendants of a man thus removed from the category of Roman citizens cease to be in his *potestas*, just as though he were dead: for it is contrary to reason that a man of foreign status should have a Roman citizen in his *potestas*. On like principle, also, if one in the *potestas* of an ascendant be interdicted from fire and water, he ceases to be in the *potestas* of his ascendant: for it is equally contrary to reason that a man of foreign status should be in the *potestas* of an ascendant who is a Roman citizen.

129. If, however, an ascendant be taken by the enemy<sup>2</sup>,

<sup>1</sup> I. 90. Ulpian, X. 3.

<sup>2</sup> Ulpian, X. 4. The nature of the *jus postliminii* is partly explained in the text. Its effect was that all things and persons taken by the

enemy were, on recapture, replaced in their original condition. Property retaken was returned to the original owners, and not left in the hands of the recaptor; liberated captives were

*ius interim* hostium fiat, pendet ius liberorum propter ius postliminii, *quia* hi qui ab hostibus capti sunt, si reversi fuerint, omnia pristina iura recipiunt. itaque reversus habebit liberos in potestate. si vero illic mortuus sit, erunt quidem liberi sui iuris; sed utrum ex hoc tempore quo mortuus est apud hostes parens, an ex illo quo ab hostibus captus est, dubitari potest. Ipse quoque filius neposve si ab hostibus captus fuerit, similiter dicemus propter ius postliminii potestatem quoque parentis in suspenso esse. (130) Praeterea exeunt liberi virilis sexus de patris potestate si flamines Diales inaugurentur, et feminini sexus si virgines Vestales capiantur. (131.) Olim quoque, quo tempore populus Romanus in Latinas regiones colonias deducebat, *qui iussu parentis profectus erat in Latinam coloniam, e patria potestate exire videbatur, cum qui ita civitate Romana cesserant acciperentur alterius civitatis cives.*

although for the while he becomes a slave of the enemy, yet by virtue of the *jus postliminii* his authority over his descendants is merely suspended; for those taken by the enemy, if they return, recover all their original rights. Therefore, if he return, he will have his descendants in his *potestas*; but if he die there, his descendants will be *sui iuris*; but whether from the time when the ascendant died amongst the enemy, or from the time when he was taken by the enemy, may be disputed<sup>1</sup>. If too the son or grandson himself be taken by the enemy, we shall in like manner rule that, by virtue of the *jus postliminii*, the *potestas* of the ascendant is merely suspended. 130. Further, male descendants escape from their father's *potestas*, if they be admitted flamens of Jupiter, and female descendants if elected vestal virgins<sup>2</sup>. 131. Formerly also, at the time when the Roman people used to send out colonies into the Latin districts, a man who by command of his ascendant set out for a Latin colony was regarded as exempt from *patria potestas*, since those who thus abandoned Roman citizenship were received as citizens of another state<sup>3</sup>.

d as having never been absent. See D. 45. 15, especially ll. 4 and 12, where the technicalities of the subject are discussed and examined.

<sup>1</sup> Justinian decided they should be

*sui iuris* from the time of the capture. Inst. I. 12. 5.

<sup>2</sup> Ulpian, X. 5. Taciti *Ann.* IV. 16.

<sup>3</sup> Notes on I. 22, I. 95. See Cic. *pro Caecin.* cap. 33, 34; *pro*

132. Emancipatione quoque desinunt liberi in potestatem parentium esse. sed filius quidem tertia demum mancipatione ceteri vero liberi, sive masculini sexus sive feminini, una mancipatione exeunt de parentium potestate: lex enim XII tantum in persona filii de tribus mancipationibus loquitur, his verbis: SI PATER FILIUM TER VENUVDABIT, FILIUS A PATRE LIBER ESTO. *eaque* res ita agitur. mancipat pater filium alicui: is eum vindicta manumittit: eo facto revertitur in potestatem patris. is eum iterum mancipat vel eidem vel alii; set in usu est eidem mancipari: isque eum postea similiter vindicta manumittit: quo facto rursus in potestatem patris sui revertitur. tunc tertio pater eum mancipat vel eidem vel alii; set hoc in usu est, ut eidem mancipetur: *eaque* mancipatione desinit in potestate patris esse, etiamsi nondum manumissus sit, set adhuc in causa mancipii [lin. 24]

132. Descendants also cease to be in the *potestas* of ascendants by *emancipation*<sup>1</sup>. But a son indeed ceases to be in his ascendant's *potestas* after three mancipations, other descendants, male or female, after one: for the Law of the 'Twelve Tables'<sup>2</sup> only requires three mancipations in the case of a son, in the words: "If a father sell his son three times, let the son be free from the father." Which transaction is thus effected: the father mancipates the son to some one or other, who manumits him by *vindicta*<sup>3</sup>: this being done, he returns into his father's *potestas*: he mancipates him a second time, either to the same man or to another, but it is usual to mancipate him to the same: and this person afterwards manumits him by *vindicta* in the same manner, which being done he returns again into his father's *potestas*: then the father a third time mancipates him either to the same man or to another; but it is usual to mancipate him to the same: and by this mancipation he ceases to be in his father's *potestas*, although he is not yet manumitted, but is in the condition called *mancipium*<sup>4</sup>.....

c. 30; *pro Balbo*, c. 11—13. In fact the direct object of the practice was to enable the new colonists to take up the *civitas* of the place they were going to colonize, and so by renouncing the *civitas* or domicile of origin, escape from the *patria potestas*. It is important to notice that this was done, and it may be presumed could

only be done, by permission and authority of their ascendants. By his own act and will therefore "*nemo patriam suam exuere potest.*"

<sup>1</sup> Ulpian, x. 1.

<sup>2</sup> Tab. iv. l. 3.

<sup>3</sup> l. 17.

<sup>4</sup> He was not generally manumitted out of *mancipium*, for then, as a



133. *Liberum autem arbitrium est ei qui filium et ex eo nepotem in potestate habebit, filium quidem de potestate dimittere, nepotem vero in potestate retinere; vel ex diverso filium quidem in potestate retinere, nepotem vero manumittere; vel omnes sui iuris efficere. eadem et de pronepote dicta esse intellegemus.*

134. *Praeterea parentes liberis in adoptionem datis in potestate cos habere desinunt; et in filio quidem, si in adoptionem datur, tres mancipationes et duae intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit, ut sui iuris efficiatur. deinde aut patri remancipatur, et ab eo is qui adoptat vindicat apud Praetorem filium suum esse, et illo*

133. He who has in his *potestas* a son and a grandson by that son, has unrestrained power to dismiss the son from his *potestas* and retain the grandson in it; or conversely, to retain the son in his *potestas*, but manumit the grandson; or to make both *sui iuris*. And we must bear in mind that the same principles apply to the case of a great-grandson.

134. Further, ascendants cease to have their descendants in their *potestas* when they are given in adoption: and in the case of a son, if he be given in adoption, three mancipationes and two intervening manumissions take place in like manner as they take place when the father dismisses him from his *potestas* that he may become *sui iuris*. Then he is either remancipated to his father, and from the father the adoptor claims him before the Praetor as being his son<sup>1</sup>, and the father putting in no

person in *mancipium* is in a servile position, the manumittor would have been his *patronus* and so have had extensive claims on his inheritance (l. 165, tit. 39, &c.), but by the process called "Cessio in jure" (tit. 24), he was reclaimed into the *potestas* of a friendly plaintiff from the middle man's *mancipium*, and then emancipated. We have a right to say that he was ultimately brought under a *potestas* and not left in a *mancipium*, on account of the express statement of l. 97, that adopted children are in *potestas*, and because by contrasting §§ 132, 134, we see that the proceedings for emancipation and adoption were identical up to the final act of manumission. The person

who manumitted him out of had, however, claims on his inheritance, but claims not so extensive as those over that of an emancipated slave. The friendly plaintiff spoken of above would in most cases be the actual father, in order to keep the property in the family.

<sup>1</sup> This is the "cessio in jure," mentioned above: the father has the son in *mancipium*, but the claimant demands *potestas* over him. The father collusively allows judgment to go against himself, and thus the claimant obtains a more extensive power than the father possesses at the time the *cessio* is made. Hence the process resembles a Recovery in old English Law, where although the

contra non vindicante a Praetore vindicanti filius addicitur, aut iure mancipatur patri *adoptivo* vindicanti *filium ab eo apud quem is tertia* mancipatione est: set sane commodius est patri remancipari. in ceteris vero liberorum personis, seu masculini seu feminini sexus, una scilicet mancipatio sufficit, et aut remancipantur parenti aut iure mancipantur. Eadem et in provinciis apud Praesidem provinciae solent fieri. (135.) Qui ex filio semel iterumve mancipato conceptus est, licet post tertiam mancipationem patris sui nascatur, tamen in avi potestate est, et ideo ab eo et emancipari et in adoptionem dari potest. At is qui ex eo filio conceptus est qui in tertia mancipatione est, non nascitur in avi potestate. set eum Labeo quidem existimat in eiusdem mancipio esse cuius et pater sit. utimur autem hoc iure, ut quamdiu pater eius in mancipio sit, pendeat ius eius: et si quidem pater eius ex mancipatione manumissus erit, cadit

counter-claim, the son is assigned by the Praetor to the claimant, or he is mancipated in court to the adopting father, who claims him as son from that person with whom he is left after the third mancipation. But the more convenient plan is for him to be remancipated to his father. In the case of other classes of descendants, whether male or female, one mancipation alone is sufficient<sup>1</sup>, and they are either remancipated to their ascendant, or mancipated in court (to a third person). In the provinces the same process is gone through before the governor thereof. 135. A child conceived from a son once or twice mancipated<sup>2</sup>, although born after the third mancipation of his father, is nevertheless in the *potestas* of his grandfather, and therefore can be either emancipated or given in adoption by him. But a child conceived from a son who has gone through the third mancipation<sup>3</sup>, is not born in the *potestas* of his grandfather. Yet Labeo thinks that he is in the *mancipium* of the same man as his father is: whilst we adopt the rule, that so long as his father is in *mancipium*, the child's rights are in suspense, and if indeed the father be manumitted after the

tenant had only a limited interest, yet the demandant claimed and got by default of the tenant's warrantor a fee simple.

<sup>1</sup> l. 132.

<sup>2</sup> l. 8j.

<sup>3</sup> "In tertia mancipatione." The preposition *in* implies that he has gone through the form of mancipation, but not yet received manumission, he is *in the third mancipation*.

in eius potestatem; si vero is, dum in mancipio sit, decesserit, sui iuris fit. (135 a.) Et de — — — — — licet — — — — — [1 lin.] ut supra diximus, quod in filio faciunt tres mancipationes, hoc facit una mancipatio in nepote.

136. *Mulieres, quamvis in manu sint, nisi coemptionem fecerint, potestate parentis non liberantur. hoc in Flaminica Diali senatusconsulto confirmatur, quo ex auctoritate consulum Maximi et Tiberonis cavetur, ut haec quod ad sacra tantum videatur in manu esse, quod vero ad cetera perinde habeatur, atque si in manum non convenisset. Sed mulieres quae coemptionem fecerunt per mancipationem potestate parentis liberantur: nec interest, an in viri sui manu sint, an extranei; quamvis haec solae loco filiarum habeantur quae in viri manu sunt.*

137. [3 lin.] *remancipatione desinunt in manu esse, et cum ex remancipatione manumissae fuerint, sui iuris efficiuntur* [3 lin.] *nihilò magis potest cogere, quam filia patrem. set filia quidem*

mancipation, he falls into his *potestas*, whilst if the father die in *mancipium* he becomes *sui iuris*. 135 a. .... as we have said above<sup>1</sup>, what three mancipationes effect in the case of a son, one mancipation effects in the case of a grandson.

136. Women are not freed from the *potestas* of their ascendants, although they be in *manus*, unless they have made a *coemptio*. This rule is confirmed in the case of the wife of a Flamen Dialis<sup>2</sup> by a *senatusconsultum*, wherein it is provided, at the instance of the consuls Maximus and Tubero, that such an one is to be regarded as in *manus* only so far as relates to sacred matters, but in respect of other things to be as though she had not come under *manus*. But women who have made a *coemptio* are freed from the *potestas* of their ascendant by the mancipation: nor is it material whether they be in the *manus* of their husband or of a stranger; although those women only are accounted in the place of daughters who are in the *manus* of a husband.

137. .... cease by the remancipation to be in *manus*, and when after the remancipation they are manumitted, they become *sui iuris*<sup>3</sup>..... can no more compel him, than a daughter can her father. But a daughter, even though

<sup>1</sup> l. 132, 134.

<sup>2</sup> The marriage of a Flamen and Flaminica was not by *confarreatio*.

<sup>3</sup> l. 115, 1

nullo modo patrem *potest* cogere, etiamsi adoptiva sit: haec autem *virum* repudio misso proinde compellere *potest*, atque si ei numquam nupta fuisset.

138. Il qui in causa mancipii sunt, quia servorum loco habentur, vindicta, censu, testamento manumissi sui iuris fiunt. (139.) Nec tamen in hoc casu lex Aelia Sentia locum habet. itaque nihil requirimus, cuius aetatis sit is qui manumittit, et qui manumittitur: ac ne illud quidem, an patronum creditoremve manumissor habeat. Ac ne numerus quidem legis Furiae Caniniae finitus in his personis locum habet. (140.) Quin etiam invito quoque eo cuius in mancipio sunt censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit, ut sibi remancipetur: nam quodammodo

adopted, can in no case compel her father; but the other (the wife) when she has had a letter of divorce sent to her<sup>1</sup> can compel her husband as though she had never been married to him<sup>2</sup>.

138. Those who are in the condition called *mancipium*<sup>3</sup>, since they are regarded as being in the position of slaves, become *sui iuris* when manumitted by *vindicta*, *census* or testament<sup>4</sup>. 139. And in such a case the Lex Aelia Sentia does not apply. Therefore we make no enquiry as to the age of him who manumits<sup>5</sup>, or of him who is manumitted<sup>6</sup>, nor even whether the manumittor have a patron or creditor<sup>7</sup>. Nay, further, the number laid down by the Lex Furia Caninia has no application to such persons<sup>8</sup>. 140. Moreover they can obtain their liberty by *census* even against the will of him in whose *mancipium* they are, except when a man is given in *mancipium* by his father with the understanding that he is to be remancipated to him: for then the father is regarded as

<sup>1</sup> "Repudio misso." A messenger or letter is sent to the other party to the marriage, seven witnesses of the age of puberty being called together to hear the instructions given to the messenger, or the contents of the letter. Warnkoenig, III. p. 52.

<sup>2</sup> "Can compel her husband to release her from *manus*, although a daughter cannot compel her father

to release her from *potestas*;" the reason being that the husband by the "repudium," has failed to fulfil his share of the compact.

<sup>3</sup> I. 132.

<sup>4</sup> I. 17.

<sup>5</sup> I. 17.

<sup>6</sup> I. 38.

<sup>7</sup> I. 37.

<sup>8</sup> I. 42.

tunc pater potestatem propriam reservare sibi videtur eo ipso, quod *mancipio* recipit. Ac ne is quidem dicitur invito eo cuius in *mancipio* est censu libertatem consequi, quem pater ex noxali causa *mancipio* dedit, velut qui furti eius nomine damnatus est, et cum *mancipio* actori dedit: nam hunc actor pro pecunia habet. (141.) In summa admonendi sumus, adversus eos quos in *mancipio* habemus nihil nobis contumeliose facere licere: alioquin iniuriarum *actione* tenebimur. Ac ne diu quidem in eo iure detinentur homines, set plerumque hoc fit dicis gratia uno momento; nisi scilicet ex noxali causa *manciparentur*.

142. Transeamus nunc ad aliam divisionem. nam ex his personis, quae neque in potestate neque in manu neque in *mancipio* sunt, quaedam vel in tutela sunt vel in curatione, quaedam neutro iure tenentur. videamus igitur quae in tutela vel in curatione sint: ita enim intellegemus ceteras personas quae neutro iure tenentur.

reserving to himself in some measure his own *potestas*, from the very fact that he is to take him back from *mancipium*<sup>1</sup>. And it is held also that a man cannot by *census* obtain his liberty against the will of the person in whose *mancipium* he is, when his father has given him in *mancipium* for a *noxal* cause<sup>2</sup>, for instance, when the father is mulcted on his account for theft, and gives him up to the plaintiff in *mancipium*: for the plaintiff has him instead of money. 141. Finally, we must observe that we are not allowed to inflict any indignity on those whom we have in *mancipium*, otherwise we shall be liable to an action for injury<sup>3</sup>. And men are not detained in this condition long, but in general it exists, as a mere formality, for a single instant; that is to say, unless they are *mancipated* for a noxal cause.

142. Now let us pass on to another division: for of those persons who are neither in *potestas*, *manus* or *mancipium*, some are in *tutela* or *curatio*, some are under neither of these powers. Let us, therefore, consider who are in *tutela* or *curatio*: for thus we shall perceive who the other persons are, who are under neither power.

He intends to give up indeed his  
as actual father, but to re-  
as an adopting father.

See note on I. 132

<sup>2</sup> IV. 75, 79.

<sup>3</sup> III. 223, 224.

143. Ac prius dispiciamus de his quae in tutela sunt.

144. Permissum est itaque parentibus liberis quos in potestate sua habent testamento *tutores* dare: masculini quidem sexus inpuberibus *dumtaxat*, *feminini autem tam inpuberibus quam nubilibus*. veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse. (145.) Itaque si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem pervenerint, filius quidem desinit habere tutorem, filia vero nihilominus in tutela permanet: tantum enim ex lege Julia et Papia Poppaea iure liberorum a tutela liberantur feminae. loquimur autem exceptis Virginibus Vestalibus quas etiam veteres in honorem sacerdotii liberas esse voluerunt: itaque etiam lege XII tabularum cautum est. (146.) Nepotibus autem neptibusque ita demum possumus testamento tutores dare, si post mortem nostram in patris sui potestatem iure recasuri non sint. itaque si filius meus mortis

143. And first let us consider about those who are under tutelage.

144. It is permitted then to ascendants to give tutors (guardians) by testament to descendants whom they have in their *potestas*: to males indeed only so long as they are under puberty, but to females whether under or over puberty<sup>1</sup>. For the ancients thought fit that women, although of full age, should for the feebleness of their intellect be under tutelage<sup>2</sup>. 145. If, therefore, a man has given by testament a tutor to his son and daughter, and both attain to puberty, the son indeed ceases to have the tutor, but the daughter still remains in tutelage; for by the Lex Julia et Papia Poppaea<sup>3</sup> it is only by the prerogative of children<sup>4</sup> that women are freed from tutelage. We except the Vestal Virgins, however, from what we are saying, whom even the ancients wished, in honour of their office, to be free: and therefore it is so provided also in a law<sup>5</sup> of the Twelve Tables. 146. But to grandsons and granddaughters we are only able to give tutors by testament, in case after our death they will not relapse into the *potestas* of their father<sup>6</sup>. Therefore if my son at the time of my death is in

<sup>1</sup> Ulpian, XI. 1, 14—16.

<sup>4</sup> I. 194.

<sup>2</sup> I. 190. Cic. *pro Muraena*, 12.

<sup>5</sup> Tab. V. 1. 1.

<sup>3</sup> Temp. *Augusti*. See note on

<sup>6</sup> I. 127.

meae tempore in potestate mea sit, nepotes quos ex eo *habeo* non poterint ex testamento meo habere tutorem, quamvis in potestate mea fuerint: scilicet quia mortuo me in patris sui potestate futuri sunt. (147.) Cum tamen in compluribus aliis causis postumi pro iam natis habeantur, et in hac causa placuit non minus postumis, quam iam natis testamento tutores dari posse: si modo in ea causa sint, ut si vivis nobis nascantur, in potestate nostra fiant. hos etiam heredes instituere possumus, cum extraneos postumos heredes instituere permissum non sit. (148.) *Uxori* quae in manu est proinde ac si filiae, item *nurui* quae in filii manu est proinde ac nepti tutor dari potest. (149.) Rectissime autem tutor sic dari potest: LUCIUM TITIUM LIBERIS MEIS TUTOREM DO. sed et si ita scriptum sit: LIBERIS MEIS VEL UXORI MEAE TITIUS TUTOR ESTO, recte datus intellegitur. (150.) In persona tamen uxoris quae in manu est recepta est etiam tutoris optio, id est, ut liceat ei permittere quem velit ipsa tutorem sibi optare, hoc modo:

my *potestas*, the grandsons whom I have by him cannot have a tutor given them by my testament, although they are in my *potestas*: the reason of course being that after my death they will be in the *potestas* of their father. 147. But whereas in many other cases posthumous children are esteemed as already born, therefore in this case too it has been held that tutors can be given by testament to posthumous as well as existing children; provided only the children are of such a character that if they were born in our lifetime, they would be in our *potestas*. We may also appoint them our heirs, although we are not allowed to appoint the posthumous children of strangers as our heirs. 148. A tutor can be given to a wife in *manus* exactly as to a daughter<sup>1</sup>, and to a daughter-in-law, who is in the *manus* of our son, exactly as to a granddaughter. 149. The most regular form of appointing a tutor is: "I give Lucius Titius as tutor to my descendants:" but even if the wording be: "Titius be tutor to my descendants or to my wife," he is considered lawfully appointed. 150. In the case, however, of a wife who is in *manus*, the selection of a tutor is also allowed, *i.e.* she may be suffered to select such person as she

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<sup>1</sup> I. 114.

<sup>2</sup> II. 289.

TITIAE UXORI MEAE TUTORIS OPTIONEM DO. quo casu licet uxori *eligere tutorem* vel in omnes res vel in unam forte aut duas. (151.) Ceterum aut plena optio datur aut angusta. (152.) Plena ita dari solet, ut proxime supra diximus. angusta ita dari solet: TITIAE UXORI MEAE DUMTAXAT TUTORIS OPTIONEM SEMEL DO, aut DUMTAXAT BIS DO. (153.) Quae optiones plurimum inter se differunt. nam quae plenam optionem habet potest semel et bis et ter et saepius tutorem optare. quae vero *angustam* habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non potest: si tantum bis, amplius quam bis optandi facultatem non habet. (154.) Vocantur autem hi qui nominatim testamento tutores dantur, *dativi*; qui ex optione sumuntur, *optivi*.

155. Quibus testamento quidem tutor datus non sit, iis ex lege XII agnati sunt tutores, qui vocantur *legitimi*. (156.) Sunt autem agnati per virilis sexus personas cognatione iuncti,

chooses for her tutor, in this form: "I give to Titia my wife the option of a tutor." In which case the wife has power to select a tutor either for all her affairs or, it may be, for one or two matters only<sup>1</sup>. 151. Moreover, the selection is allowed either without restraint or with restraint. 152. That without restraint is given in the form we have stated just above. That with restraint is usually given thus: "I give to my wife Titia the selection of a tutor once only," or "I give it twice only." 153. Which selections differ very considerably from one another. For a woman who has selection without restraint can choose her tutor once, or twice, or thrice, or more times: but she who has selection with restraint, if it be given her once only, cannot choose more than once; if twice only, has not the power of choosing more than twice. 154. Tutors who are given by name in a testament are called *dativi*, those who are taken by virtue of selection, *optivi*.

155. To those who have no tutor given them by testament, the agnates are tutors by a law of the Twelve Tables, and they are called *tutores legitimi*<sup>2</sup>. 156. Now the agnates<sup>3</sup> are those united in relationship through persons of the male sex,

<sup>1</sup> Livii XXXIX. 19, and Plaut. *Truculent.* Act IV. sc. 4, 6.

<sup>2</sup> Ulpian, XI. 3.

<sup>3</sup> Ibid. 4.



quasi a patre cognati: veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et patrum filius *et nepos* ex eo. At hi qui per feminini sexus *personas cognatione iunguntur non sunt agnati, sed alias* naturali iure cognati. itaque inter avunculum et sororis filium non agnatio est, sed cognatio. item amitae, materterae filius non est mihi agnatus, set cognatus, et invicem scilicet ego illi eodem iure coniungor: quia qui nascuntur patris, non matris familiam sequuntur. (157.) Sed olim quidem, quantum ad legem XII tabularum attinet, etiam feminae agnatos habebant tutores. set postea lex Claudia lata est quae, quod ad feminas attinet, tutelas *illas* sustulit. itaque masculus quidem inpubes fratrem puberem aut patruum habet tutorem; feminae vero talem habere tutorem non *intelliguntur*. (158.) Set agnationis quidem ius capitis diminutione perimitur, cognationis vero ius non commutatur: quia civilis ratio civilia quoniam iura corrumpere potest, naturalia vero non potest.

relations, that is to say, through the father: for instance a brother born from the same father, the son of that brother, and the grandson by that son; an uncle on the father's side, that uncle's son, and his grandson by that son. But those who are joined in relationship through persons of the female sex are not agnates, but merely cognates by natural right. Therefore there is no agnation between a mother's brother and a sister's son, but only cognation. Likewise the son of my father's sister or of my mother's sister is not my agnate, but my cognate, and conversely of course I am joined to him by the same tie: because children follow the family of their father, not of their mother<sup>1</sup>. 157. In olden times, indeed, so far as the law of the Twelve Tables is concerned, women too had agnates for tutors, but afterwards the Lex Claudia<sup>2</sup> was passed, which abolished these tutelages so far as relates to women. A male, therefore, under the age of puberty will have as tutor his brother over the age of puberty or his father's brother; but women, it is well known, have not a tutor of that kind. 158. By *capitis diminutio* the right of agnation is destroyed, but that of cognation is not changed: because a civil law doctrine may destroy civil law rights, but it cannot destroy those of natural law.

1. 80.

<sup>2</sup> l. 171. Ulp. xi. 8.

159. Est autem capitis diminutio prioris *capitis* permutatio. etque tribus modis accidit: nam aut maxima est capitis diminutio, aut minor quam quidam mediam vocant, aut minima.

160. Maxima est *capitis* diminutio, cum aliquis simul et civitatem et libertatem ammittit; quae — — — — qui ex patria [3½ lin.]; item *feminae liberae ex senatusconsulto* Claudiano ancillae fiunt eorum dominorum, quibus invitis et denunciantibus *nihilo minus* cum servis eorum coierint.

161. Minor *capitis* diminutio est, cum civitas quidem amittitur, libertas vero retinetur. quod accidit ei cui aqua et igni interdictum fuerit.

162. Minima *capitis* diminutio est, cum et civitas et liber-

159. *Capitis diminutio*<sup>1</sup> is the change of the original and occurs in three ways; for it is either the *capitis diminutio maxima*; or the minor, which some call *media*; or the *minima*.

160. The *maxima capitis diminutio* is when a man loses at once both citizenship and liberty, which (happens to those) who (are expelled) from their country<sup>2</sup>; likewise free women by virtue of a *senatusconsultum* of Claudius become slaves of those masters with whose slaves, in spite of their wish and warning, they have cohabited<sup>3</sup>.

161. The *minor capitis diminutio* is when citizenship indeed is lost, but liberty retained, which happens to a man interdicted from fire and water<sup>4</sup>.

162. The *minima capitis diminutio* is when citizenship and

<sup>1</sup> Ulpian, XI. 9-13. *Status* and are not identical in Roman law—a slave is often said to have , but it is also affirmed of him that he has “*nullum caput*.” Austin is of opinion that “*status* and *caput* are not synonymous expressions, but that the term *caput* signifies certain conditions which are capital or principal: which cannot be acquired or lost without a mighty change in the legal position of the party.” *Caput* necessarily implies the possession of rights: *status* generally implies the possession of rights, but may imply mere obnoxiousness to duties, e.g. the *status* of a slave. See Austin, Lecture XII. *Caput* includes

(1) Liberty, (2) Citizenship, (3) Family. (1) includes (2) and (3); (2) includes (3), therefore by the *maxima c. d.*, all these elements are lost, by the *media* all but liberty, by the *minima* family alone.

<sup>2</sup> This is Huschke's emendation, his complete filling up of the passage being: “qui ex patria jure gentium violato peregrinis populis per patrem patratus deduntur.” For information as to the *pater patratus*, consult a classical dictionary, or read pp. 16-18 of Kent's *International Law* (Abdy's edition), Cic. *pro Cacc.* 34; Livy, I. 24, 32.

<sup>3</sup> Ulpian. I. 91; XI. 11.

<sup>4</sup> I. 90, 128.

*tas retinetur, sed status hominis commutatur. quod accidit* in his qui adoptantur, item in his qui coemptionem faciunt, et in his qui mancipio dantur, quique ex mancipatione manumittantur; adeo quidem, ut quotiens quisque mancipetur, *aut remancipetur*, totiens capite diminuatur. (163.) Nec solum maioribus diminutionibus ius agnationis corrumpitur, sed etiam minima. et ideo si ex duobus liberis alterum pater emancipaverit, *post obitum eius* neuter alteri agnationis iure tutor esse poterit.

164. Cum autem ad agnatos tutela *pertinet*, non simul ad omnes pertinet, set ad eos tantum qui proximo gradu sunt. [*desunt lin. 24.*]

165. *Ex eadem lege duodecim tabularum libertorum et libertarum tutela ad patronos liberosque eorum pertinet, quae et ipsa legitima tutela vocatur: non quia nominatim ea lege de hac tutela cavetur, sed quia perinde accepta est per interpretationem, atque si verbis legis introducta esset. eo enim ipso, quod hereditates libertorum libertarumque, si intestati decessissent, iusserat lex*

liberty are retained, but the *status* of a man is changed; which is the case with persons adopted, likewise with those who make a *coemptio*, and with those who are given in *mancipium*, and with those who are manumitted after mancipation<sup>1</sup>: so that indeed as often as a man is mancipated or remancipated, so often does he suffer *capitis diminutio*. 163. Not only by the greater *diminutiones* is the right of agnation destroyed, but even by the least; and therefore if a father have emancipated one of two sons, neither can after his death be tutor to the other by right of agnation.

164. In cases, however, when the tutelage devolves on the agnates, it does not appertain to all simultaneously but only to those who are in the nearest degree.....

165. By virtue of the same law of the Twelve Tables the tutelage of freedmen and freedwomen devolves on the patrons and their children, (and this too is styled a *tutela legitima*): not because express provision is made in that law with respect to this tutelage, but because it is gathered by construction as surely as if it had been set down in the words of the law. For from the very fact that the law ordered the inheritances of

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<sup>1</sup> l. 110, 116, 132.

*ad patronos* liberosve eorum pertinere, crediderunt veteres voluisse legem etiam tutelas ad eos pertinere, cum et agnatos quos ad hereditatem vocavit, eosdem et tutores esse iusserat.

166. Exemplo patronorum *etiam* fiduciariae tutelae receptae sunt. *eae enim tutelae scilicet* fiduciariae vocantur proprie, quae ideo nobis competunt, quia *liberum caput* mancipatum nobis vel a parente vel a coemptionatore manumiserimus. (167.) Set Latinarum et Latinorum *inpuerum tutela non omni modo* ad manumissores, *sicut bona eorum*, pertinet, sed ad eos quorum *ante manumissionem ex iure Quiritium fuerunt*: unde si ancilla *ex iure Quiritium* tua sit, in bonis mea, a me quidem solo, non

freedmen and freedwomen, in case of their dying intestate, to belong to the patrons or their children, the ancients concluded that the law intended their tutelages also to devolve on them, since it ordered that the agnates too, whom it called to the inheritance, should be tutors as well<sup>1</sup>.

166. Fiduciary tutelages have been admitted into use upon the precedent of patronal tutelages<sup>2</sup>. For those are properly called fiduciary tutelages which devolve upon us, because we have manumitted a free person who has been mancipated to us either by a parent or a coemptionator. 167. But the tutelage of Latin women or Latin men under puberty does not in all cases appertain to their manumittors, as their goods do, but devolves on those whose property they were *ex jure Quiritium* before manumission<sup>3</sup>: therefore if a female slave be yours *ex jure Quiritium*, mine *in bonis*, if manumitted by me alone and

<sup>1</sup> The argument is :

(1) The agnates who have the inheritance, also have the tutelage.

(2) Therefore the inheritance and the tutelage, the benefit and the burden, devolve on the same persons.

(3) Now the patrons have the inheritance by the express words of the law.

(4) Therefore they also have the tutelage.

<sup>2</sup> I. 114, 115, 195. Ulpian, XI. 5.

<sup>3</sup> The manumittor might be owner both "in bonis," and "ex jure Quiritium," or he might only have the

title "in bonis." (See II. 40.) For by reading I. 54, we see that if the legal ownership was separated from the beneficial, the beneficial owner, *i. e.* the owner *in bonis*, having the *potestas*, had the power of manumission. The general rule in the case of tutelages which were for the profit of the tutor as well as the pupil, was that the benefit (the right of inheritance) should go with the burden (the tutelage proper), but in this paragraph Gaius is pointing out an exception. Ulpian, XI. 19.

etiam a te manumissa, *Latina* fieri potest, et bona eius ad me pertinent, sed eius tutela tibi competit: nam ita lege Iunia cavetur. itaque si ab eo cuius et in bonis et ex iure Quiritium ancilla fuerit facta sit Latina, ad eundem et bona et tutela pertinet.

168. *Agnatis, qui legitimi tutores sunt, item manumissoribus* permissum est feminarum tutelam alii in iure cedere: pupillorum autem tutelam non est permissum cedere, quia *non videtur onerosa*, cum tempore pubertatis finiatur. (169.) Is autem cui ceditur tutela cessicius tutor vocatur. (170.) Quo mortuo aut capite diminuto revertitur ad eum tutorem tutela qui cessit. ipse quoque qui cessit, si mortuus aut capite *diminutus* sit, a cessicio tutela discedit et revertitur ad eum, qui post eum qui cesserat secundum gradum in tutela habuerit. (171.) Set quantum ad agnatos pertinet, nihil hoc tempore de cessicia tutela quaeritur, cum agnatorum tutelae in feminis lege Claudia sublatae sint. (172.) Sed fiduciarios quoque quidam puta-

not by you also, she can be made a Latin, and her goods belong to me, but her tutelage devolves on you: for it is so provided by the Lex Junia. Therefore if she be made a Latin by one to whom she belonged both *in bonis* and *ex jure Quiritium*, the goods and the tutelage both go to the same man.

168. Agnates, who are legitimate tutors, and manumitters also, are allowed to transfer to others by *cessio in jure*<sup>1</sup> the tutelage of women; but not that of pupils, because this tutelage is not looked upon as onerous, inasmuch as it must terminate at the time of puberty. 169. He to whom a tutelage is thus ceded is called a *tutor cessicius*: 170. and on his death or *capitis diminutio* the tutelage returns to him who ceded it. So too, if the man himself who ceded it die or suffer *capitis diminutio*, the tutelage shifts from the *cessicius* and reverts to him who had the claim to the tutelage next in succession to the cessor. 171. But so far as relates to agnates, no questions now arise about cessician tutelage, inasmuch as the tutelages of agnates over women were abolished by the Lex Claudia<sup>2</sup>. 172. Some, however, have held that fiduciary tutors also have not power

<sup>1</sup> II. 24. Ulpian, xi. 6 –8. Note on I. 135.

<sup>2</sup> I. 157.

verunt cedendae tutelae ius non habere, cum ipsi se oneri subiecerint. quod etsi placeat, in parente tamen qui filiam neptemve aut proneptem alteri ea lege mancipio dedit, ut sibi remanciparetur, remancipatamque manumisit, idem dici non debet, cum is et legitimus tutor habeatur; et non minus huic quam patronis honor praestandus est.

173. Praeterea senatusconsulto mulieribus permissum est in absentis tutoris locum alium petere: quo petito prior desinit. nec interest quam longe aberit is tutor. (174.) Set excipitur, ne in absentis patroni locum liceat libertae tutorem petere. (175.) Patroni autem loco habemus etiam parentem qui in *e mancipio* sibi remancipatam filiam neptemve aut proneptem manumissione legitimam tutelam nactus est. huius quidem liberi fiduciarii tutoris loco numerantur: patroni autem liberi eandem tutelam adipiscuntur, quam et pater eorum habuit. (176.) Sed ad certam quidem causam etiam in patroni absentis

to cede a tutelage, since they have voluntarily undertaken the burden. But although this be the rule, yet the same must not be laid down in respect of an ascendant who has given a daughter, granddaughter, or great-granddaughter in *mancipium* to another on condition that she be remancipated to him, and has manumitted her after the remancipation: since such an one is also<sup>1</sup> reckoned a legitimate tutor, and in no less degree must respect be paid to him than to a patron.

173. Further by a *senatusconsultum* women are allowed to apply for a tutor in the place of one who is absent, and on his appointment the original tutor ceases to act: nor does it matter how far the original tutor has gone away<sup>2</sup>. 174. But there is an exception to this, that a freedwoman may not apply for a tutor in the place of an absent patron. 175. We also regard as in the place of a patron an ascendant who has acquired by manumission legitimate tutelage over a daughter, granddaughter or great-granddaughter remancipated to him out of *mancipium*<sup>3</sup>. The children, however, of such an one are regarded as fiduciary tutors<sup>4</sup>, whereas the children of a patron acquire the same kind of tutelage as

<sup>1</sup> "Also," *i.e.* in addition to the two classes of *legitimi* already named  
Conf. I. 175.

<sup>2</sup> Ulpian, xi. 22.

<sup>3</sup> I. 172.

<sup>4</sup> D. 26. 4. 4.

locum *permisit senatus* tutorem petere, veluti ad hereditatem adeundam. (177.) Idem senatus censuit et in persona pupilli patroni filii. (178.) *Itemque* lege Julia de maritandis ordinibus ei quae in legitima tutela pupilli sit permittitur dotis constituendae gratia a Praetore urbano tutorem petere. (179.) Sane patroni filius etiamsi impubes sit, libertae *efficietur* tutor, at in nulla re auctor fieri potest, cum ipsi nihil permissum sit sine tutoris auctoritate agere. (180.) Item si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere. (181.) Quibus casibus salvam manere tutelam patrono patronique filio manifestum est. (182.) Praeterea senatus censuit, ut si tutor pupilli *pupillaeve* suspectus a tutela remotus sit, sive ex iusta causa fuerit excusatus,

their father also had. 176. But the senate has allowed a woman to apply for a tutor for a definite purpose even in the place of an absent patron, for instance to enter upon an inheritance<sup>1</sup>. 177. The senate has adopted the same rule in the case of the son of a patron being a pupil<sup>2</sup>. 178. So also by the *Lex Julia de maritandis ordinibus* a woman who is in the legitimate tutelage of a pupil is allowed to apply for a tutor from the Praetor Urbanus for the purpose of arranging her *dos*<sup>3</sup>. 179. For the son of a patron undoubtedly becomes the tutor of a freed-woman, even though he be under puberty, and yet he can in no instance authorize<sup>4</sup> her acts, since he is not allowed to do anything for himself without the authorization of his tutor. 180. Likewise, if a woman be in the legitimate tutelage of a mad or dumb person, she is by the *senatusconsultum*<sup>5</sup> allowed to apply for a tutor for the purpose of arranging her *dos*. 181. In these cases it is plain that the tutelage remains intact for the patron and the son of the patron. 182. Further the

<sup>1</sup> Ulpian, XI. 22.

<sup>2</sup> Ibid. 22.

<sup>3</sup> Ibid. 20. For an account of *dos*, see Lord Mackenzie's *Rom. Law*, p. 103; Sandars, p. 112 and p. 234; and Ulp. VI.

<sup>4</sup> The *auctoritas* of the tutor is the tutor's presence and assent to the deed of the pupil. The pupil himself performs the symbolical act or utters the words necessary to effect the transaction in hand, but his will

is considered to be defective on account of his youth (or in the case of a woman, her sex); and the tutor's presence and approval add a sound will to a duly performed act, the two requisites insisted on by the law. *Auctoritas* is derived from *augo*, and signifies the complement or supplying of a defect.

<sup>5</sup> Probably that referred to in I. 173, and in Ulp. XI. 21.

in locum eius alius tutor *detur*, quo dato prior tutor amittit tutelam. (183.) Haec omnia similiter et Romae et in provinciis solent observari — — — — — si vero — — — — — — — (184.) Olim cum legis actiones in usu erant, etiam ex illa causa tutor dabatur, si inter tutorem et mulierem pupillumve legis actione agendum erat: *nam quia ipse quidem tutor in re sua auctor esse non poterat, alius dabatur, quo auctore illa legis actio perageretur*: qui dicebatur praetorius tutor, quia a Praetore urbano dabatur. post sublatas legis actiones quidam putant hanc speciem dandi tutoris non esse necessariam; sed adhuc dari in usu est, si legitimo iudicio agatur.

185. Si cui nullus omnino tutor sit, ei datur in urbe Roma ex lege Atilia a Praetore urbano et maiore parte Tribunorum plebis, qui Atilianus tutor vocatur; in provinciis vero a Prae-

senate has ruled that if a tutor of a pupil, male or female, be removed from his tutorship as untrustworthy<sup>1</sup>, or be excused on some lawful ground<sup>2</sup>, another tutor may be given in his place, and on his appointment the original tutor loses his tutorship. 183. All these rules are observed in like manner at Rome and in the provinces<sup>3</sup>.....

184. Formerly when the *legis actiones*<sup>4</sup> were in use, a tutor used also to be given in case proceedings by *legis actio* had to be taken between a tutor and a woman or pupil: for inasmuch as the tutor could not be *auctor* in any matter that concerned himself, another used to be appointed by whom as *auctor* the *legis actio* was conducted: and he was called a Praetorian tutor, because he was appointed by the Praetor Urbanus. Now that *legis actiones* have been abolished, some authorities hold that this kind of appointed tutor has become unnecessary; but it is still usual for such an one to be appointed, where proceedings have to be taken by legal (as opposed to praetorian) action<sup>5</sup>.

185. Supposing a person to have no tutor at all, one is given him, in the city of Rome by virtue of the Lex Atilia<sup>6</sup>, by the Praetor Urbanus and the major part of the Tribunes of the

<sup>1</sup> Just. I. 26.

<sup>2</sup> Just. I. 25; Ulpian, XI. 23.

<sup>3</sup> Ulp. XI. 20.

<sup>4</sup> IV. 11 seqq. Ulpian, XI. 24.

<sup>5</sup> IV. 103.

<sup>6</sup> Enacted about 250 B.C. Ulpian, XI. 18.



sidibus provinciarum ex lege Julia et Titia. (186.) Et ideo si cui testamento tutor sub condicione aut ex die certo datus sit, quamdiu condicio aut dies pendet, tutor dari *potest*; item si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex iis legibus tutor petendus est: qui desinit tutor esse postea *quam* quis ex testamento tutor esse coeperit. (187.) Ab hostibus quoque tutore capto ex his legibus tutor datur, qui desinit tutor esse, si is qui captus est in civitatem reversus fuerit: nam reversus recipit tutelam iure postliminii.

188. Ex his apparet quot sint species tutelarum. si vero quaeramus, in quot genera hae species deducantur, longa erit disputatio: nam de ea re valde veteres dubitaverunt, nosque diligentius hunc tractatum exsecuti sumus et in edicti interpretatione, et in his libris quos ex Quinto Mucio fecimus. hoc

Plebs, who is called an Atilian tutor: in the provinces, by the governors thereof, by virtue of the Lex Julia et Titia<sup>1</sup>. 186. And therefore if a tutor be appointed to any one by testament under a condition or to act after a certain day, so long as the condition is unfulfilled or the day not arrived, another tutor may be appointed: likewise if the tutor be appointed without condition, still for such time as no heir exists<sup>2</sup> another tutor must be applied for under these laws, who ceases to be tutor as soon as any one begins to act as tutor under the testament. 187. Also when a tutor is taken by the enemy, another tutor is appointed under these laws, who ceases to be tutor if the captive return into the state; for having returned he recovers his tutelage by the *jus postliminii*<sup>3</sup>.

188. From the foregoing it appears how many species of tutelage there are. But if we enquire into how many classes these species may be collected, the discussion will be tedious: for the ancients held most opposite opinions on this point, and we have carefully investigated this question both in our explanation of the Edict and in those commentaries which we have based on the works of Quintus Mucius<sup>4</sup>. Meanwhile it is

<sup>1</sup> Enacted 30 B. C.

carried out.

<sup>2</sup> The institution of the heir is the main point of a Roman will, and until he accepts the inheritance, no provision of the will can be

<sup>3</sup> I. 129.

<sup>4</sup> See this phrase discussed in note on II. 152.

solum tantisper sufficit admonuisse, quod quidam quinque genera esse dixerunt, ut Quintus Mucius; alii tria, ut Servius Sulpicius; alii duo, ut Labeo; alii tot genera esse crediderunt, quot etiam species essent.

189. Sed inpuberes quidem in tutela esse omnium civitatum iure contingit; quia id naturali rationi conveniens est, ut is qui perfectae aetatis non sit alterius tutela regatur. nec fere ulla civitas est, in qua non licet parentibus liberis suis inpuberibus *testamento* tutorem dare: quamvis, ut supra diximus, soli cives Romani videantur tantum liberos in potestate habere. (190.) Feminas vero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse videtur. nam quae vulgo creditur, quia levitate animi plerumque decipiuntur, et aequum erat eas tutorum auctoritate regi, magis speciosa videtur quam vera. muli-

sufficient to make this remark only, that some have held that there are five classes, as Quintus Mucius; others three, as Servius Sulpicius; others two, as Labeo<sup>1</sup>; whilst others have thought that there are as many classes as species<sup>2</sup>.

189. But for those under puberty to be in tutelage is a rule established by the law of all communities; because it is agreeable to natural reason that he who is not of full age should be guided by the tutelage of another; and there is scarcely any community where ascendants are not allowed to give by testament a tutor to their descendants under puberty; although, as we have said above, Roman citizens alone seem to have their children in *potestas*<sup>3</sup>. 190. But there is scarcely any reason of value to be assigned for the notion that women of full age should be put under tutelage<sup>4</sup>. For the one generally received<sup>5</sup>, that owing to their feebleness of intellect, they are so often deceived, and that it is right they should be directed by the authority of tutors, appears more specious than true. For women who are

<sup>1</sup> This Q. M. Scaevola (son of Pub. M. Scaevola) is the man of whom Pomponius speaks as the earliest systematic writer on the Civil Law, and whom Cicero styles the most erudite, acute, and skilful lawyer of his day, "juris peritorum eloquentissimus, eloquentium juris peritissimus." See D. 1. 2. 41. Cic. *de Orat.* 1. 39. For a memoir of

Servius Sulpicius Rufus see Cicero, *Brutus*, c. 41, and for Antistius Labeo, D. 1. 2. 47.

<sup>2</sup> For an account of the various kinds of *tutela* see Appendix (C).

<sup>3</sup> I. 55.

<sup>4</sup> I. 144.

<sup>5</sup> See Livy, xxxiv. 2; Cic. *pro Muræna*, c. 12; and Ulp. xi. 1.

eres enim quae perfectae aetatis sunt ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor interponit auctoritatem suam; saepe etiam invitus auctor fieri a Praetore cogitur. (191.) Unde cum tutore nullum ex tutela iudicium mulieri datur: at ubi pupillorum pupillarumve negotia tutores tractant, eis post pubertatem tutelae iudicio rationem reddunt. (192.) Sane patronorum et parentum legitimae tutelae vim aliquam habere intelleguntur eo, quod hi neque ad testamentum faciendum, neque ad res Mancipi alienandas, neque ad obligationes suscipiendas auctores fieri coguntur, praeterquam si magna causa alienandarum rerum Mancipi obligationisque suscipiendae interveniat. eaque omnia ipsorum causa constituta sunt, ut quia ad eos intestatarum mortuarum hereditates pertinent, neque per testamentum excludantur ab hereditate, neque alienatis pretiosioribus rebus susceptoque aere alieno minus locuples ad eos hereditas perveniat.

of full age manage their affairs for themselves, and the tutor affords his authorization as a mere formality in certain matters; and is even often compelled by the Praetor to intervene as *auctor* against his will'. 191. 'Therefore a woman is allowed no action against her tutor on account of his tutelage: but when tutors manage the business of pupils, male or female, they render them an account by an *actio tutelae*<sup>2</sup>, after they have reached the age of puberty. 192. 'The legitimate tutelages of patrons and ascendants may clearly be seen to have some binding force, from the fact that these tutors are not compelled to authorize either the making of a testament, the alienation of *res Mancipi*, or the contracting of obligations, unless some urgent cause arise for the alienation of the *res Mancipi*, or the contracting of the obligation. And all these regulations are made for the advantage of the tutors themselves, that, since the inheritances of the women, if they die intestate, belong to them, they may neither be excluded by a testament from the inheritance, nor may the inheritance come to them depreciated in value through the more precious articles being alienated and debt incurred. 193. Amongst foreign nations women are not

<sup>1</sup> II. 122. Ulpian, XI. 25.

<sup>2</sup> It should be noticed that Gaius

uses *iudicium* and *actio* as interchangeable terms.

(193.) Aput peregrinos non similiter, ut aput nos, in tutela sunt feminae; set tamen plerumque quasi in tutela sunt: ut ecce lex Bithynorum, si quid mulier *contrahat*, maritum auctorem esse iubet aut filium eius puberem.

194. Tutela autem liberantur ingenuae quidem trium *liberorum iure*, libertinae vero quattuor, si in *patroni* liberorumve eius legitima tutela sint. nam et ceterae quae alterius generis tutores habent, velut Atilianos aut fiduciarios, trium liberorum *iure liberantur*. (195.) Potest autem pluribus modis *libertina* alterius generis habere, veluti si a femina manumissa sit: tunc enim e lege Atilia petere debet tutorem, vel in provincia *e lege Julia et Titia*: nam patronae *tutclam libertorum suorum liberatarumve gerere non possunt*. Sed et si sit a masculo manumissa, et auctore eo coemptionem fecerit, deinde remancipata et manumissa sit, patronum quidem habere tutorem desinit, incipit autem habere eum tutorem a quo manumissa est, qui fiduciarius

in tutelage as they are with us: but yet they are generally in a position analogous to tutelage; for instance, a law of the Bithynians orders that if a woman make any contract, her husband or son over the age of puberty shall authorize it.

194. Freeborn women are freed from tutelage by prerogative of three children; freedwomen by that of four<sup>1</sup>, if they be in the legitimate tutelage of a patron or his children. For the other freedwomen who have tutors of another kind, as *Atilian* or *fiduciary*, are also freed by the prerogative of three children. 195. Now a freedwoman may in various ways have tutors of a different kind (from legitimate), for instance if she have been manumitted by a woman; for then she must apply for a tutor in accordance with the *Lex Atilia*, or in the provinces in accordance with the *Lex Julia et Titia*: for patronesses cannot hold the tutelage of their freedmen or freedwomen. Besides, if she have been manumitted by a man, and with his authorization have made a *coemptio*, and then been remancipated and manumitted, she ceases to have her patron as tutor, and begins to have as tutor him by whom she was manumitted, and such an one is called a fiduciary tutor<sup>2</sup>. Likewise, if a patron

<sup>1</sup> This privilege was conferred by the *Lex Papia Poppaea*, A.D. 10.

<sup>2</sup> L. 115.

dicitur. Item si patronus sive filius eius in adoptionem se dedit, debet sibi *e lege Atilia vel Titia* tutorem petere. Similiter ex iisdem legibus petere debet tutorem *liberta*, si patronus decedit nec ullum virilis sexus liberorum in familia relinquit.

196. *Masculi quando* puberes esse coeperint, tutela liberantur. *Puberem autem Sabinus* quidem *et Cassius ceterique nostri praeceptores* cum esse putant qui habitu corporis pubertatem ostendit, *hoc est* qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam, cuius aetatis puberes fiunt. sed diversae scholae auctores annis putant pubertatem aestimandam, id est eum puberem esse existimandum, qui XIII annos explevit— [24 lineae.]

or his son have given himself in adoption, she ought to apply for a tutor for herself in accordance with the *Leges Atilia* and *Titia*. So also a freedwoman ought to apply for a tutor under these same laws, if her patron die and leave in his family no descendant of the male sex.

196. Males are freed from tutelage when they have attained the age of puberty<sup>1</sup>. Now Sabinus and Cassius and the rest of our authorities<sup>2</sup> think that a person is of the age of puberty who shows puberty by the development of his body, that is, who can procreate: but that with regard to those who cannot attain to puberty, such as eunuchs-born, the age is to be regarded at which persons (generally) attain to puberty. But the authors of the opposite school think that puberty should be reckoned by age, *i.e.* that a person is to be regarded as having attained to puberty who has completed his fourteenth year.

<sup>1</sup> Ulpian, xi. 28.

<sup>2</sup> Gaius was a disciple of the two great lawyers Sabinus and Cassius. The authorities of the opposite school, to whom he here refers, were Proculus and his followers.

It is scarcely necessary to remind the reader that the Sabinians, as that school was called, were distinguished by their preference for a strict and close adherence to the letter of the law; the Proculians for their decided inclination for a broader interpretation than strict adherence to

the letter permitted. Much has been written on the distinctions between the two sects, and their influences on the laws and jurisprudence of Rome: among the leading authorities are Gravina, *de Ortu et Prog. Jur. Civ.* § 45; Hoffman's *Historia Juris*, Pt. I. p. 312; Mascow, *de sectis Sab. et Proc.*; Hugo, *Rechtsgeschichte*, translated into French by Jourdan, Tom. II. §§ 324—329. Gibbon, c. 44.

<sup>3</sup> Fourteenth year if a male, twelfth if a female. Just. I. 22.

197. ————— aetatem pervenerit in qua res suas tueri possit. *idem* apud peregrinas gentes custodiri superius indicavimus. (198.) Ex iisdem causis et in provinciis a Praesidibus earum curatores dari voluit.

199. Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusque consumantur aut deminuantur, curat Praetor, ut et tutores et *curatores* eo nomine satisdant. (200.) Set hoc non est perpetuum. nam et tutores testamento dati satisfacere non coguntur, quia fides eorum et diligentia ab ipso testatore probata est; et *curatores* ad quos non e lege curatio pertinet, set *qui* vel a Consule vel a Praetore vel a Praeside provinciae *dantur*, plerumque non coguntur satisfacere, scilicet quia satis *idonei electi* sunt.

197. ....<sup>1</sup> shall have arrived at the age at which he can take care of his own affairs. That the same rule is observed among foreign nations we have stated above<sup>2</sup>. 198. Under the same circumstances he ordained that curators should be given in the provinces also by the governors thereof.

199. To prevent, however, the property of pupils and of those who are in curation from being wasted or diminished by tutors and curators, the Praetor provides that both tutors and curators shall furnish sureties<sup>3</sup> as to this matter. 200. But this rule is not of universal application. For, firstly, tutors given by testament are not compelled to furnish sureties, because their integrity and carefulness are borne witness to by the testator himself: and, secondly, curators to whom the curation does not come by virtue of a *lex*, but who are appointed either by a Consul, or a Praetor, or a governor of a province, are in most cases not compelled to furnish sureties, for the reason, obviously, that men suitable for the office are selected.

<sup>1</sup> As the laws relating to curators are to be found in Just. *Inst.* I. 23 and Ulpian, XII., it is sufficient to observe that a tutor has authority over the person as well as the property of his ward, whilst the curator is only concerned with the property: and that the office of the latter begins when the ward attains the age of 14 (when the tutor ceases

to act), and continues till the ward is 25.

<sup>2</sup> I. 189.

<sup>3</sup> *Satisdare* = to find sureties (third parties), and not to enter into a personal bond. The law as to sureties (*sponsores*, *fidepromissores* and *fidejussores*) will be found in III. 115—127, and IV. 88—101.

## BOOK II.

1. *Superiore commentario de iure personarum exposuimus; modo videamus de rebus: quae vel in nostro patrimonio sunt, vel extra nostrum patrimonium habentur.*

2. *Summa itaque rerum divisio in duos articulos deducitur: nam aliae sunt divini iuris, aliae humani.*

3. *Divini iuris sunt veluti res sacrae et religiosae. (4.) Sacrae sunt quae Diis superis consecratae sunt; religiosae, quae Diis manibus relictæ sunt. (5.) Sed sacrum quidem*

1. In the preceding commentary we have treated of the law of persons: now let us consider as to things: which are either within our patrimony or without it.

2. The chief division of things, then, is reduced to two heads: for some things are *divini iuris*, others *humani iuris*<sup>1</sup>.

3. Of the *divini iuris* class are things sacred or religious.

4. Things sacred<sup>2</sup> are those which are consecrated to the Gods above: things religious those which are given up to the Gods below. 5. Now land is considered sacred when made so by au-

<sup>1</sup> It will be observed that the divisions of things given in §§ 1, 2 are not coincident but disparate divisions. *Res divini iuris* form only a part of *res extra patrimonium*. Thus we may tabulate:—

A. *In patrimonio—Res singulorum.*

B. *Extra patrimonium—*(1) *Res communes.* Of which the use is common to all the world; the *proprietas* belongs to none.

(2) *Res publicae:* of which the use is common to all the members of a state; the *proprietas* is in the state.

(3) *Res universitatis:* belonging to a corporation.

(4) Things consecrated:

(a) *Res sanctae.*

(β) *Res religiosae.*

(γ)

} Divini  
iuris.

<sup>2</sup> See Festus sub verb. *sacer*.

*existumatur auctoritate populi Romani fieri; consecratur enim lege de ea re lata aut senatusconsulto facto.*

6. Religiosum vero nostra voluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. (7.) Set in provinciali solo placet plerisque solum religiosum non fieri, quia in *eo solo* dominium populi Romani est vel Caesaris, nos autem possessionem tantum *et usumfructum* habere videmur. utique tamen *eiusmodi locus, licet non sit religiosus, pro religioso habetur*, quia etiam quod in provinciis non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur.

8. Sanctae quoque res, velut muri et portae, quodammodo divini iuris sunt.

9. Quod autem *divini* iuris est, id nullius in bonis est: id vero quod humani *iuris est plerumque alicuius in bonis est: potest autem et nullius in bonis esse. nam res hereditariae, antequam*

thority of the Roman people: for it is consecrated by the passing of a *lex* or the making of a *senatusconsultum* in respect of it.

6. On the other hand, we make ground religious of our own free will by conveying a corpse into a place which is our own property, provided only that the burial of the corpse devolves on us. 7. But it has been generally held that in provincial land a place cannot be made religious, because in such land the ownership belongs to the Roman people or to Caesar<sup>1</sup>, and we are considered to have only the possession and usufruct<sup>2</sup>. Still, however, such a place, although it be not religious, is considered as religious, because that also which is consecrated in the provinces, not by authority of the Roman people, is strictly speaking not sacred, and yet is regarded as sacred.

8. Hallowed things also, for instance walls and gates, are in some degree *divini iuris*.

9. Now that which is *divini iuris* is the property of no one; whilst that which is *humani iuris* is generally the property of some one, although it may be the property of no one. For the items of an inheritance, before some one becomes heir<sup>3</sup>,

<sup>1</sup> See note on I. 6.

<sup>2</sup> See Long's Introduction to Cicero's orations *De Lege Agraria*; Savigny, *On Possession*, translated by

Perry, § 13.

<sup>3</sup> The heir instituted in the will becomes heir only by entering upon the office and duties, therefore in the



*aliquis heres existat, nullius in bonis sunt. (10.) Hae autem res quae humani iuris sunt, aut publicae sunt aut privatae. (11.) quae publicae sunt, nullius in bonis esse creduntur; ipsius enim universitatis esse creduntur. privatae autem sunt, quae singulorum sunt.*

12. *Quaedam praeterea res corporales sunt, quaedam incorporeales. (13.) Corporales hae sunt quae tangi possunt, veluti fundus, homo, vestis, aurum, argentum et denique aliae res innumerabiles. (14.) Incorporeales sunt quae tangi non possunt: qualia sunt ea quae in iure consistunt, sicut hereditas, usufructus, obligationes quoquo modo contractae. nec ad rem pertinet, quod in hereditate res corporales continentur; nam et fructus qui ex*

are no one's property. 10. Those things again which are *humani iuris* are either public or private. 11. Those which are public are considered to be no one's property: for they are regarded as belonging to the community; whilst private things are those which belong to individuals.

12. Further some things are corporeal, some incorporeal. 13. Corporeal things are those which can be touched, as a field, a man, a garment, gold, silver and, in a word, other things innumerable. 14. Incorporeal things are those which cannot be touched: of this kind are those which consist in a right<sup>1</sup>, as an inheritance, an usufruct, or obligations in any way contracted. Nor is it material that in an inheritance there are comprised corporeal things: for the fruits also which are gathered in<sup>2</sup> (by the tenant) from land are corporeal, and that

interval between the death of the testator and the acceptance of the inheritance there was a vacancy and the *Res* were *nullius*.

<sup>1</sup> We see therefore that incorporeal things are not, strictly speaking, things at all, but only the rights to things. We may also remark that "tangible" signifies in Roman law that which is perceptible by any sense, according to the Stoic notion that all senses are modifications of that of touch. Hence "acts" are corporeal things according to this classification. Austin, Lecture XIII. See Cicero, *Topica*, cap. v.

<sup>2</sup> Without entering into the discussion of a subject which has engaged the attention and divided the judgment of many old authorities, and which occupied a leading position in the Roman law of Possession, it is sufficient to say that it was by the *perception*, i. e. the reduction into possession, that the tenant, usufructuary, and generally every one who derived his rights to the profits from the owner, acquired those profits. Savigny, *On Possession*, translated by Perry, Bk. II. § 24, pp. 200—204. See D. 41. 1. 48 pr., D. 7. 4. 13, D. 22. 1. 25. 1.

*fundo percipiuntur corporales sunt, et id quod ex aliqua nobis debetur plerumque corporale est, veluti fundus, pecunia: nam ipsum ius successionis, et ipsum ius utendi fruendi, et ipsum ius obligationis incorporale est. eodem numero sunt et iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur. — [13 fere lineae desunt.]*

15. Item [2 lin.] *Ea autem animalia nostri quidem praec-*

which is due to us by virtue of an obligation is generally corporeal, as a field, a slave or money; whilst the right itself of succession and the right itself of the usufruct, and the right itself of the obligation, are incorporeal. In the same category are rights over estates urban or rustic, which are also called servitudes<sup>1</sup>.

15. (The first six lines are supplied from Ulpian, XIX. 1). All things are either *mancipi* or *nec Mancipi*<sup>2</sup>. *Res Mancipi* are

<sup>1</sup> Urban and rustic estates mean respectively lands with or without buildings on them: the situation of either, whether in town or country, is immaterial: cf. D. 8. 4. 1. From the epitome of Gaius (II. 1, § 3) we get the substance of the missing thirteen lines: "The rights over estates urban or rustic are also incorporeal. The rights over urban estates are those of *stillicidium* (turning the droppings from your roof into your neighbour's premises), of windows, drains, raising a house higher, or restraining another from raising, and of lights, (i. e.) that a man is so to build that he do not block out the light from a neighbouring house. The rights over rustic estates are those of way, or of road whereby animals may pass or be led to water, and of channel for water: and these also are incorporeal. These rights whether over rustic or urban estates are called servitudes."

<sup>2</sup> *Res Mancipi*, it is clear, were such things as were objects of interest and value in the eyes of the early possessors of Roman citizen-rights, or probably of those who laid the foundations of ancient Rome. Hence we see, firstly, how small in number were

these objects, secondly, that they were such only as had a value to an agricultural people, and, thirdly, that the few rights (as distinguished from material objects) which appeared among them were rights or easements that almost necessarily formed parts of some of these material objects. Why they were called *Res Mancipi* has puzzled a host of commentators, no less than when and how they grew into being, but neither question is insoluble. They were, in fact, such things as the old settlers cared to possess and as could be transferred by the hand and into the hand, *manus*, as we have said before, being the symbol of property; and since for a long time they were the only things worthy of consideration as property, they got a name in time, more for the purpose of classification and distinction than for any other. *When* is not of much consequence, but probably not till it was necessary to distinguish them from many other things that had become known to use and practice, and which by way of opposition were called *nec Mancipi*. See as to this subject Maine's *Ancient Law*, chapter viii. p. 277.

*ceptores* statim ut nata sunt Mancipi esse putant: *Nerva vero, Proculus* et ceteri diversae scholae auctores non aliter ea Mancipi esse putant, quam si domita sunt; et si propter nimiam feritatem domari non possunt, tunc videri Mancipi esse, cum ad eam aetatem pervenerint, cuius aetatis domari solent.

(16.) *Ex diverso bestiae nec Mancipi* sunt, velut ursi, leones, item ea animalia quae fere bestiarum numero sunt, velut elefantes et cameli; et ideo ad rem non pertinet, quod haec animalia etiam collo dorsove domantur — — — — —

— — — — — quorum — — — — — Mancipi esse; quaedam non Mancipi sunt. (17.) Item fere omnia quae incorporalia sunt nec Mancipi sunt, exceptis servitutibus praediorum rusticorum in Italico solo, quae Mancipi sunt, quamvis sint ex numero rerum incorporalium.

18. Magna autem differentia est Mancipi rerum et nec man-

estates on Italian soil, whether rustic, as a field, or urban, as a house: likewise rights over rustic estates, as *via*<sup>1</sup>, *iter*, *actus*, *aquae ductus*: likewise slaves, and quadrupeds which are tamed by yoke and saddle (*lit.* by neck and back), as oxen, mules, horses, asses. These animals our authorities hold to be *Mancipi* the moment they are born: but *Nerva* and *Proculus* and other authors of the opposite school consider that they are not *Mancipi* unless they be broken in: and if through their excessive fierceness they cannot be broken in, then they are regarded as being *Mancipi* on arriving at the age at which animals are usually broken in. 16. Wild-beasts on the other hand, such as bears and lions, are *nec Mancipi*: so are those animals which are usually in the category of wild-beasts, as elephants and camels, and therefore it is not material that such animals are (sometimes) tamed by yoke and saddle..... 17. Likewise, almost all things which are incorporeal are *nec Mancipi*, with the exception of servitudes over rustic estates on Italian soil; which are *Mancipi*, although they are in the category of incorporeal things<sup>2</sup>.

18. Now there is a great difference between *res Mancipi*

<sup>1</sup> *Iter* = right of passage for a man only, according to Justinian:

*Actus* = right of driving cattle as well:

*Via* = right of passage generally, including right of dragging stones, timber, &c. across. *Inst.* II. 3.

<sup>2</sup> *Cic. pro Flacco*, c. 32.

cipi. (19.) Nam res nec *mancipi nuda traditione alienari possunt*, si modo corporales sunt et ob id recipiunt traditionem. (20.) Itaque si tibi vestem vel aurum vel argentum tradidero, sive ex venditionis causa sive *ex donationis* sive quavis alia ex causa, tua fit ea res sine ulla iuris solemnitate. (21.) In eadem causa sunt *provincialia* praedia, quorum *alia stipendiaria*, alia tributaria vocamus. Stipendiaria sunt ea quae in his provinciis sunt, quae propriae populi Romani esse intelleguntur. Tributaria sunt ea quae in his provinciis sunt, quae propriae Caesaris esse creduntur. (22.) Mancipi vero res aequae per mancipationem ad alium transferuntur; unde scilicet *mancipi* res sunt dictae. quod autem valet *mancipatio*, idem valet et in iure cessio. (23.) Et *mancipatio* quidem quemadmodum fiat, superiore commentario tradidimus. (24.) In iure cessio autem hoc modo fit. apud magistratum populi Romani, velut Praetorem, vel apud Praesidem provinciae is cui res in iure ceditur, rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITUM

and *res nec Mancipi*. 19. For *res nec Mancipi* can be alienated by mere delivery, provided only they be corporeal, and so admit of delivery. 20. Therefore if I deliver to you a garment or gold or silver, whether on the ground of sale, or donation, or on any other ground, the thing becomes yours without any legal formality. 21. Provincial lands, some of which we call stipendiary, some tributary, pass in like manner. Stipendiary are those which are situated in the provinces regarded as specially belonging to the Roman people: tributary are those which are in the provinces considered as specially belonging to Caesar<sup>1</sup>. 22. Similarly, *res Mancipi* are transferred to another by mancipation: whence no doubt they were called *res Mancipi*. But whatever effect a mancipation has, the same has also a *cessio in iure*. 23. How a mancipation is effected we have explained in the preceding Commentary<sup>2</sup>. 24. A *cessio in iure* is managed as follows<sup>3</sup>. He to whom the thing is being passed by cession, taking hold of it in the presence of a magistrate of the Roman people, for instance, a Praetor, or the Governor of a province, speaks thus: "I assert this man to be mine *ex jure Quiritium*." Then, after he has

1. 6. 11. 7.

2. 1. 119.

3. Ulpian, XIX. 9.

MEUM ESSE AIO. deinde postquam hic vindicaverit, Praetor interrogat eum qui cedit, an contra vindicet. quo negante aut tacente, tunc ei qui vindicaverit eam rem addicit. idque legis actio vocatur, quae fieri potest etiam in provinciis aput Praesides earum. (25.) Plerumque tamen et fere semper mancipationibus utimur. quod enim ipsi per nos praesentibus amicis agere possumus, hoc non est necesse cum maiore difficultate aput Praetorem aut aput Praesidem provinciae quaerere. (26.) At si neque mancipata, neque in iure cessa sit res Mancipi [desunt 31 lin.] (27.) In summa admonendi sumus nexum Italici soli proprium esse, provincialis soli nexum non esse: recipit enim nexus significationem solum non aliter, quam si Mancipi est, provinciale vero nec Mancipi est. — enim vero provincia — — — — —

made his claim, the Praetor questions the man who is making the cession, whether he puts in a counter-claim: and on his saying no or holding his peace, the Praetor assigns the thing to him who has claimed it. And this is called a *legis actio*<sup>1</sup>, and can be transacted in the provinces also before the governors thereof. 25. Generally, however, and indeed almost always, we employ mancipation. For when we can do the business by ourselves in the presence of our friends, there is no need to seek its accomplishment in a more troublesome manner before the Praetor or the governor of a Province. 26. But if a *res Mancipi* have been passed neither by mancipation nor *cessio in iure*.....<sup>2</sup> 27. Finally, we must take notice that *nexum* is peculiar to Italian land: there is no *nexum* of provincial land: for land admits of the application of *nexum* only when it is *Mancipi*, and provincial land is *nec Mancipi*<sup>3</sup>.

<sup>1</sup> IV. 11 et seqq.

<sup>2</sup> Most probably Gaius went on to say that when a *res Mancipi* was merely delivered, the man who received it had it *in bonis* only, and not *ex iure Quiritium*. See II. 41.

<sup>3</sup> *Nexūs* is a conjectural reading, for which the more correct version would have been *nexi*. *Nexum* and *nexus* are both substantives, the former an old word found in the Twelve Tables as antithetical to

(see Tab. VI. l. 1), the latter a more modern expression, used to signify obligation generally, see D. 10. 2. 31. 33 and D. 12. 6. 26. 7.

The meaning of *nexum* is given by Varro (*de L. Lat.* VII. 105): "Nexum Mamilius scribit, omne quod per libram et aes geritur, in quo sint Mancipia. Mutius, quae per aes et libram fiunt, ut obligentur, praeter quae Mancipio dentur. Hoc verius esse ipsum verbum ostendit, de quo

28. Incorporales *res* traditionem non recipere manifestum est. (29.) Sed iura praediorum urbanorum in iure tantum cedi possunt; rusticorum vero etiam mancipari possunt. (30.) Ususfructus in iure cessionem tantum recipit. Nam dominus proprietatis alii usumfructum in iure cedere potest, ut ille usumfructum habeat, et ipse nudam proprietatem *retineat*. Ipse usufructuarius in iure cedendo domino proprietatis usumfructum *efficit*, ut a se discedat et convertatur in proprietatem. alii vero in iure cedendo nihilominus ius suum retinet: creditur enim ea cessione nihil agi. (31.) Sed haec scilicet in Italicis praediis ita sunt, quia et ipsa praedia mancipationem et in iure cessionem *recipiunt*. alioquin in provincialibus praediis sive quis usumfructum sive ius eundi, agendi, aquamve ducendi, vel altius tollendi aedes, aut non tollendi, ne lumini-

28. That incorporeal things do not admit of delivery is obvious. 29. But rights over urban estates can only be conveyed by *cessio in jure*; whilst those over rustic estates can be by mancipation also. 30. Usufruct<sup>1</sup> admits of *cessio in jure* only. For the owner of the property can make *cessio in jure* of the usufruct to another, so that the latter may have the usufruct, and he himself retain the bare ownership. The usufructuary, on his part, by making *cessio in jure* of the usufruct to the owner of the property causes it to depart from him and be absorbed in the ownership. But if he make *cessio in jure* of it to another he still retains his right, for it is considered that nothing is done by such a *cessio*<sup>2</sup>. 31. But these rules only apply to Italian lands, because the lands themselves are also subjects for mancipation and *cessio in jure*. In provincial lands on the contrary, if a man desire to establish a usufruct, or right of path, road, watercourse, raising buildings higher, or preventing buildings being raised higher lest a

quaerit. Nam idem quod obligatur per libram, neque suum fit, inde nexum dictum." See also Festus sub verb. Hence *nexum* is any dealing *per aes et libram*, whether of the nature of a contract executed or executory. In § 27 *nexum* seems to be used only as a synonym for *mancipatio*, in the ordinary meaning of

the latter, and does not bear the more technical sense which Mutius ascribes to it, viz. a contract *per aes et libram*, as contradistinguished from *mancipatio*, a conveyance by the same method.

<sup>1</sup> An account of usufruct is to be found in Just. II. 4.

<sup>2</sup> Just. II. 4. § 3.

bus vicini officiatur ceteraque similia iura constituere velit, pactionibus et stipulationibus id efficere potest; quia ne ipsa quidem praedia mancipationem aut *in iure* cessionem recipiunt. (32.) Et cum usufructus et hominum et ceterorum animalium constitui possit, intellegere debemus horum usumfructum etiam in provinciis per *in iure* cessionem constitui posse. (33.) Quod autem diximus usumfructum *in iure* cessionem tantum recipere, non est temere dictum, quamvis etiam per mancipationem constitui possit eo quod in mancipanda proprietate detrahi potest: non enim ipse usufructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit, ut apud alium usufructus, apud alium proprietas sit. (34.) Hereditas quoque *in iure* cessionem tantum recipit. (35.) Nam si is ad quem ab intestato legitimo iure pertinet hereditas *in iure* eam alii ante aditionem cedat, id est ante quam heres extiterit, perinde fit heres is cui *in iure* cesserit, ac si ipse per legem ad hereditatem

neighbour's lights be interfered with, and other similar rights, he can only do it by pacts and stipulations<sup>1</sup>, because even the lands themselves do not admit of mancipation or *cessio in jure*. 32. Also, since it is possible for an usufruct to be established over slaves and other animals, we must understand that usufruct over them can be established by *cessio in jure* even in the provinces<sup>2</sup>. 33. When, however, we said that usufruct admitted of *cessio in jure* only, we were not speaking at random, although it may be established by mancipation also, inasmuch as it may be withheld in a mancipation of the property: for in such a case the usufruct itself is not mancipated, although the result of its being withheld in mancipating the property is that the usufruct is left with one person and the property with another. 34. An inheritance also is a thing which admits of *cessio in jure* only. 35. For if he to whom an inheritance on an intestacy belongs by statute law<sup>3</sup> make *cessio in jure* of it before entry, *i.e.* before he has become heir, the other to whom he has ceded it becomes heir, just as if he had himself been called by

<sup>1</sup> III. 92 et seqq.

<sup>2</sup> Slaves and animals are *res mancipi*: therefore by the principle implied in § 31, the usufruct of them can be conveyed by *cessio in jure*. Further, the *cessio in jure* may take place even in the provinces; for

moveable *res mancipi* are *res mancipi* all over the world, lands alone are *res mancipi* in Italy only.

<sup>3</sup> *Legitimo jure* = by virtue of a rule of the Twelve Tables or some *lex*; as opposed to a rule of the Praetor's edict.



### *Cessio in jure hereditatis.*

vocatus esset: post obligationem vero si cesserit, nihilominus ipse heres permanet et ob id creditoribus tenebitur, debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt; corpora vero eius hereditatis perinde transeunt ad eum cui cessa est hereditas, ac si ea singula in iure cessa fuissent. (36.) Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agit; postea vero quam adierit si cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem *in iure* cedat. (37.) Idem et de necessariis heredibus diversae scholae auctores existimant, quod nihil videtur interesse utrum *aliquis* adeundo hereditatem fiat heres, an invitus existat: quod quale sit, suo loco apparebit. sed nostri praeceptores putant nihil agere necessarium heredem, cum in iure cedat hereditatem. (38.) Obligationes quoquo

law to the inheritance: if, however, he make *cessio* after (accepting) the obligation, he still remains heir himself, and will therefore be liable to the creditors, but the debts (due to the inheritance) perish, and so the debtors to the inheritance are benefited<sup>1</sup>: the corporeal items, however, of the inheritance pass to him to whom the inheritance is ceded, just as if they had been ceded singly<sup>2</sup>. 36. But an heir appointed by testament, if he make *cessio in jure* before entry on the inheritance, does a void act: whilst if he cede after entry, the results are the same as those we have just named in the case of one to whom an inheritance on an intestacy devolves by statute law, if he make *cessio in jure* after (accepting) the obligation. 37. The authorities of the school opposed to us hold the same in regard to *heredes necessarii*, because it seems to them immaterial whether a man becomes heir by entering on an inheritance, or becomes heir against his will. What the meaning of this is will be seen in its proper place. But our authorities think that the *heres necessarius* does a void act when he makes *cessio in jure* of the inheritance<sup>3</sup>. 38. Obligations, in what-

<sup>1</sup> He is liable to the creditors because he has done an act which identifies him juridically with the deceased. The debtors are not liable to him because he has freely given up the juridical identity he had esta-

blished; nor are they liable to the cessionary, because they are not bound to recognize him as a successor to their creditor, the deceased.

<sup>2</sup> Ulpian, XIX. 12—15.

<sup>3</sup> II. 152; III. 87.



modo contractae nihil eorum recipiunt. nam quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possum; sed opus est, ut iubente me tu ab eo stipuleris: quae res efficit, ut a me liberetur et incipiat tibi teneri: quae dicitur novatio obligationis. (39.) sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri.

40. Sequitur ut admoneamus apud peregrinos quidem unum esse dominium: ita aut dominus quisque est, aut dominus non intellegitur. Quo iure etiam populus Romanus olim utebatur: aut enim ex iure Quiritium unusquisque dominus erat, aut non intellegebatur dominus. set postea divisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. (41.) nam si tibi rem Mancipi neque Mancipa-

ever way they be contracted, admit of none of these (forms of transfer). For if I desire that a thing which is owed to me by a certain person should be owed to you, I cannot bring this about by any of those methods whereby corporeal things are transferred to another: but it is necessary that you should by my order stipulate (for the thing) from him, and the result produced by this is that he is set free from me and begins to be bound to you: this is called a *novatio* of the obligation<sup>1</sup>. 39. But without such novation you cannot bring a suit in your own name, but must sue in my name as my *cognitor* or

40. The next point for us to state is that amongst foreigners there is but one kind of ownership: thus a man is either owner (absolutely) or is not regarded as owner (at all). And this rule the Roman people followed of old, for a man was either owner *ex jure Quiritium*, or he was not regarded as owner. But afterwards ownership became capable of division, so that one man might be owner *ex jure Quiritium*, another hold *in bonis*. 41. For if I neither mancipate nor pass by *cessio in jure*, but

<sup>1</sup> III. 176.

<sup>2</sup> A *cognitor* is an agent appointed in court and in the presence of the other party to the suit: a *procurator* is appointed by mandate, and the

opposing party has not necessarily any knowledge of his appointment till the time comes for him to act. IV. 83, 84.

vero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium vero mea permanebit, donec tu eam possidendo usucapias: semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium, tua res esse, ac si ea mancipata vel in iure cessa esset. (42.) *Usucapio autem* mobilium quidem rerum anno completur, fundi vero et aedium biennio; et ita lege XII tabularum cautum est.

43. Ceterum etiam earum rerum usucapio nobis competit quae non a domino nobis traditae fuerint, sive mancipi sint *res* sive nec mancipi, si modo ea bona fide acceperimus, cum crederemus eum qui tradiderit dominum esse. (44.) Quod ideo receptum videtur, ne rerum dominia diutius in incerto essent: cum sufficeret domino ad inquirendam rem suam anni aut biennii spatium, quod tempus ad usucapionem possessori tributum est.

merely deliver to you, a *res mancipi*, the thing becomes yours indeed *in bonis* but remains mine *ex jure Quiritium*, until through possessing it you acquire it by usucapion: for as soon as usucapion is completed the thing is at once yours in full title, i.e. both *in bonis* and *ex jure Quiritium*, just as though it had been mancipated or passed by *cessio in jure*. 42. Now the usucapion of moveable things is completed in a year, that of land and buildings in two years: and it is so laid down in a law of the 'Twelve Tables'.

43. Moreover usucapion runs for us even in respect of those things which have been delivered to us by one not the owner, whether they be *res mancipi* or *nec mancipi*, provided only we have received them in good faith, believing that he who delivered them was the owner. 44. This seems to have become a custom in order to prevent the ownership of things being too long in doubt: inasmuch as the space of one or two years would be enough for the owner to make enquiries after his property, and that is the time allowed to the possessor for gaining the property by usucapion.

<sup>1</sup> "Usus-auctoritas fundi biennium, ceterarum rerum annus esto." Tab. VI. I. 3. Quoted by Cic. *Top.* IV. 23.

See also Cic. *pro Caelina*, § 54; Ulp. XIX. 8. For the alteration of the times of usucapion see Just. *Inst.* II. 6.

45. Set aliquando etiamsi maxime quis bona fide alienam rem possideat, numquam tamen illi usucapio procedit, velut si qui rem furtivam aut vi possessam possideat; nam furtivam lex XII tabularum usucapi prohibet, vi possessam lex Iulia et Plautia. (46.) Item provincialia praedia usucapionem *non* recipiunt. (47.) *Item olim* mulieris quae in agnatorum tutela erat res Mancipi usucapi non poterant, praeterquam si ab ipsa tutore *auctore* traditae essent: idque ita lege XII tabularum cautum erat. (48.) Item liberos homines et res sacras et religiosas usucapi non posse manifestum est.

49. Quod ergo vulgo dicitur furtivarum rerum et vi possessarum usucapionem per legem XII tabularum prohibitam esse, non eo pertinet, ut *ne ipse fur quive per vim possidet*, usu-

45. But sometimes, although a man possess a thing most thoroughly in good faith, yet usucapion will never run for him, for instance if a man possess a thing stolen or taken possession of by violence: for a law of the 'Twelve Tables'<sup>1</sup> forbids a stolen thing to be gotten by usucapion, and the Lex Julia et Plautia does the same for a thing taken possession of by violence<sup>2</sup>. 46. Provincial lands also do not admit of usucapion<sup>3</sup>. 47. Likewise, in olden times the *res Mancipi* of a woman who was in the tutelage of her agnates could not be gotten by usucapion, except they had been delivered by the woman herself with the authorization of her tutor<sup>4</sup>: and this was so provided by a law of the 'Twelve Tables'<sup>5</sup>. 48. It is clear also that free men and sacred and religious things cannot be gotten by usucapion.

49. The common saying, that usucapion of things stolen or taken possession of by violence is prohibited by the law of the 'Twelve Tables', does not mean that the thief himself or possessor by violence cannot get by usucapion (for usu-

<sup>1</sup> Tab. VIII. l. 17.

<sup>2</sup> The two requisites of a possession which will enable usucapion, are *bona fides* and *iusta causa*. The latter is deficient in the present example, for although the goods are in the possession of an innocent alien, yet they came to him from one wrongfully possessed. See § 49 below.

<sup>3</sup> In the case of provincial lands the *dominium* was reserved to the Roman people, therefore obviously no private holder could avail himself of usucapion to acquire *dominium*.

<sup>4</sup> Cic. *pro Flacco*, c. 84. Cic. *ad Att.* 1. 5.

<sup>5</sup> Tab. V. l. 2.

capere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet); sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat. (50.) Unde in rebus mobilibus non facile procedit, ut bonae fidei possessori usucapio competat, quia qui alienam rem vendidit et tradidit furtum committit; idemque accidit, etiam si ex alia causa tradatur. Set tamen hoc aliquando aliter se habet, nam si heres rem defuncto commodatam aut locatam vel aput eum depositam, existimans eam esse hereditariam, vendiderit aut donaverit, furtum non committit. item si is ad quem ancillae ususfructus pertinet, partum etiam suum esse credens vendiderit aut donaverit, furtum non committit; furtum enim sine affectu furandi non committitur. aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur. (51.) Fundi quoque

caption does not avail for him on another account, namely that he possesses in bad faith :) but that no one else has the right of usucaption, even though he buy from him in good faith. 50. Whence, in respect to moveable things, it does not easily happen that usucaption will avail for a possessor in good faith, because he who has sold and delivered a thing belonging to another, commits a theft, and the same rule holds also if it be delivered on any other ground<sup>1</sup>. Sometimes, however, it is otherwise; for if an heir thinking that a thing lent or let to the deceased or deposited with him is a part of the inheritance, has sold or given it away, he commits no theft<sup>2</sup>. Likewise, if he to whom the usufruct of a female slave belongs, thinking that her offspring is also his, sells it or gives it away, he commits no theft<sup>3</sup>, for theft is not committed without the intent of thieving. It may happen in other ways also that a man may without the taint of theft deliver a thing belonging to another to a third person, and cause it to be gained through usucaption by the possessor. 51. A man may also obtain possession without

<sup>1</sup> Any other ground than sale, sc.

<sup>2</sup> D. 41. 3. 36. pr.

<sup>3</sup> III. 197. We see from this that the Roman lawyers excused mistakes of law as well as fact. The reason why this particular mistake was ex-

cused is shown in D. 41. 3. 36. The usufructuary supposes he has a right to the *fructus* of the *ancilla*, because the usufructuary of a flock of sheep has a right to the young of that flock.

*fide possessio.*

alieni potest aliquis sine vi possessionem nancisci, quae vel ex negligentia domini vacet, vel quia dominus sine successore decesserit vel longo tempore afuerit. nam si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamvis ipse qui vacantem possessionem nactus est, intellegat alienum esse fundum, tamen nihil hoc bonae fidei possessori ad usucapionem nocet, cum inprobata sit eorum sententia qui putaverint furtivum fundum fieri posse.

52. Rursus ex contrario accidit, ut qui sciat alienam rem se possidere usucapiat: velut si rem hereditariam cuius possessionem heres nondum nactus est, aliquis possederit; nam ei concessum est usucapere, si modo ea res est quae recipit

violence of the land of another, which is vacant either through the carelessness of the owner, or because the owner has died without a successor, or has been absent for a long time<sup>1</sup>. If then he transfer it to another, who receives it in good faith, this second possessor can get it by usucapion: for although the man himself who has taken the vacant possession, may be aware that the land belongs to another, yet this is no hindrance to the *bonâ fide* possessor's gaining it by usucapion<sup>2</sup>, inasmuch as the opinion of those lawyers has been set aside who thought that land could be the subject of a theft.

52. Again, in the converse case, it sometimes happens that he who knows that he is in possession of a thing belonging to another may yet acquire an usucaptive title to it. For instance, if any one takes possession of an item of an inheritance of which the heir has not yet obtained possession<sup>3</sup>: for he is allowed

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<sup>1</sup> This paragraph is cited almost as it stands in D. 41. 3. 37, being there stated as taken from Gaii Lib. 11. *Institut.* Laws 36 and 38, which are also very similar to §§ 50 and 52, are noted as taken from Gaii Lib. 11. *Rerum quotidianarum sive Aureorum.*

<sup>2</sup> The first taker is deficient in *bona fides*, but not so the second. On the principle laid down in 11. 44 the possession of the first is sufficient to establish *justa causa* when the transfer is made to the second. Hence the second has both the requisites of *civilis poss.*

that is to say, which will enable usucapion), viz. *justa causa* and *bona fides*.

<sup>3</sup> In the case of a vacant inheritance, that is, one of which the heir had not yet taken possession, the Roman law permitted any one to enter and in time to acquire an usucaptive title, which was technically called *pro herede*. In this case as neither *bona fides* nor good title at starting were necessary, the *causa* might really be founded on unfair motives; hence to use Gaius's phraseology it was an "*improba possessio et usucapio*."

usucapionem. quae species possessionis et usucapionis pro herede vocatur. (53.) Et in tantum haec usucapio concessa est, ut et res quae solo continentur anno usucapiantur. (54.) Quare autem etiam hoc casu soli rerum annua constituta sit usucapio, illa ratio est, quod olim rerum hereditariarum possessione velut ipsae hereditates usucapi credebantur, scilicet anno. lex enim XII tabularum soli quidem res biennio usucapi iussit, ceteras vero anno. ergo hereditas in ceteris rebus videbatur esse, quia soli non est, quia neque corporalis est: et quamvis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo tenentur, annua usucapio remansit. (55.) Quare autem omnino tam improba possessio et usucapio concessa sit, illa ratio est, quod voluerunt veteres maturius hereditates adiri, ut essent qui sacra facerent, quorum illis temporibus summa

to get it by usucapion, provided only it is a thing which admits of usucapion. This species of possession and usucapion is called *pro herede*<sup>1</sup>. 53. And this usucapion has been allowed to such an extent that even things appertaining to the soil are acquired by usucapion in one year. 54. The reason why in this case the usucapion of things belonging to the soil is allowed to operate in one year is this; that in former times, by possession of the items of an inheritance, the inheritances themselves were, in a manner, considered to be gained by usucapion, and that of one year. For a law of the 'Twelve Tables'<sup>2</sup> ordered that things appertaining to the soil should be acquired by usucapion of two years, but all other things in one. An inheritance therefore was considered to be one of the "other things," because it is not connected with the soil, since it is not even corporeal: and although at a later period it was held that inheritances themselves could not be acquired in usucapion, yet the usucapion of one year remained established in respect of all the items of inheritances, even those connected with the soil. 55. And the reason why so unfair a possession and usucapion have been allowed at all is this: that the ancients wished inheritances to be entered upon speedily, that there might be persons to perform the sacred rites (of the family), to which the greatest attention

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<sup>1</sup> See D. 41. 5.

<sup>2</sup> Tab. vi. l. 3.

observatio fuit, et ut creditores haberent a quo suum consequerentur. (56.) Haec autem species possessionis et usucapionis etiam lucrativa vocatur: nam sciens quisque rem alienam lucrificat. (57.) Sed hoc tempore etiam non est lucrativa. nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapiones revocarentur; et ideo potest heres ab eo qui rem usucepit, hereditatem petendo perinde eam rem consequi, atque si usucapta non esset. (58.) et necessario tamen herede extante ipso iure pro herede usucapi potest.

59. *Adhuc* etiam ex aliis causis sciens quisque rem alienam usucapit. nam qui rem alicui fiduciae causa mancipio dederit vel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet, *etiam* soli si sit. quae species usucapionis dicitur usureceptio, quia id quod aliquando habuimus recipimus per

was paid in those times, and that the creditors might have some one from whom to obtain their own. 56. This species, then, of possession and usucapion was also called *lucrativa* (profitable): for a man with full knowledge makes profit out of that which belongs to another. 57. At the present day, however, it is not profitable, for at the instance of the late emperor Hadrian a *senatusconsultum* was passed, that such usucapions should be set aside: and therefore the heir by suing for the inheritance may recover the thing from him who acquired it by usucapion, just as though it had not been acquired by usucapion. 58. But if the heir be of the kind called *necessarius* usucapion *pro herede* can by force of law take place.

59. There are other cases besides in which a man with full knowledge gets by usucapion the property of another. For he who has given a thing to any one in *mancipium* or made *cessio in jure* of it, by way of *fiducia*<sup>1</sup>, provided he himself have the possession of the same, can acquire it by usucapion, and that too in one year<sup>2</sup>, even though it appertain to the soil. This species of usucapion is called *usureceptio*,

<sup>1</sup> II. 153. III. 201.

<sup>2</sup> *Fiducia* was a pact, attached to a conveyance by mancipation or *in jure cessio*, whereby the recipient of the thing or person transferred bound himself to restore it on request. See Dirksen, sub verbo, § 2. Savigny, *On*

*Possession*, p. 216. Cic. *pro Flacc.* c. 21.

<sup>3</sup> The principle is the same as in § 54: the term of usucapion is one year, because the thing is a pledge, therefore one of the "*cacterae res*," and no account is taken of its being a pledge.



## Usureceptio.

usucapionem. (60.) Sed cum fiducia contrahitur aut cum creditore pignoris iure, aut cum amico, quod tutius nostrae res aput eum essent, si quidem cum amico contracta sit fiducia, sane omni modo competit usus receptio; si vero cum creditore, soluta quidem pecunia omni modo competit, nondum vero soluta ita demum competit, si neque conduxerit eam rem a creditore debitor, neque precario rogaverit, ut eam rem possidere liceret; quo casu lucrativa usucapio competit. (61.) Item si rem obligatam sibi *populus* vendiderit, *eamque* dominus possederit, concessa est usureceptio: sed hoc casu praedium bienio usurecipitur. et hoc est quod volgo dicitur ex praedia-

because we take back by usucapion what we have had once before. 60. But since a fiduciary contract is usually entered into either with a creditor by way of pledge, or with a friend for the purpose of more completely securing such property of ours as he has in his hands; if the assurance be made with a friend, *usureceptio* is in all cases allowable: but if with a creditor, then after payment of the money it is universally allowable, but before payment *usucapio lucrativa*<sup>1</sup> is only allowed in case the debtor has neither hired the thing from the creditor<sup>2</sup>, nor asked for its possession by way of *precarium*<sup>3</sup>. 61. Likewise, if the *populus* have sold a thing pledged to it, and the original owner keep possession, *usureceptio* is allowed: but in this case if the subject of the pledge be land<sup>4</sup>, it is usurecepted in two years. And hence comes the common saying that

<sup>1</sup> Savigny (*Treatise on Possession*, p. 51) takes this as an example of the rule. "Nemo sibi causam possessionis mutare potest." The whole of the passage pp. 49—52 is worth reading.

<sup>2</sup> A hirer has no juridical possession, but is regarded as agent for the lessor: having then no possession, he can have no usucapion. D. 13. 6. 8; D. 41. 2. 3. 20. See Savigny, *On Possession*, translated by Perry, p. 206.

<sup>3</sup> With reference to the matter here stated Savigny says, "Whoever simply permits another to enjoy property or an easement retains to himself the right of revocation at will,

and the juridical relation thence arising is called *Precarium*." See Savigny, *On Possession*, p. 355, where the learning on the subject of *precarium* and the interdict connected with it is set out at length.

<sup>4</sup> *Praedium* is any thing attached to or connected with the land, sometimes the word is used antithetically to *persona*. See D. 43. 20. 1. 43; and as to Praediator in the sense used in this paragraph see Cic. *pro Balbo*, c. 20, and *In Verrem*, II. 1. 54. Varro says that *praedium* properly signifies land pledged: *de L. L.* v. 40. So also does Pseudo-Asconius in his commentary on the passage from the Verrine orations quoted above.



possessionem usurecipi. nam qui mercatur a populo praediator appellatur.

62. Accidit aliquando, ut qui dominus sit alienandae rei potestatem non habeat, et qui dominus non sit alienare possit. (63.) Nam dotale praedium maritus invita muliere per legem Iuliam prohibetur alienare, quamvis ipsius sit vel mancipatum ei dotis causa vel in iure cessum vel usucaptum. quod quidem ius utrum ad Italica tantum praedia, an etiam ad provincialia pertineat, dubitatur.

64. Ex diverso agnatus furiosi curator rem furiosi alienare potest ex lege xii tabularum; item procurator, *id est cui libera administratio permessa est*; item creditor pignus ex pactione, quamvis eius ea res non sit. sed hoc forsitan ideo videatur

possession is usurecepted from a *praediatura*<sup>1</sup>. For he who buys from the people is called a *praediator*.

62. It sometimes happens that he who is owner has not the power of alienating a thing, and that he who is not owner can alienate. 63. For by the Lex Julia<sup>2</sup> a husband is prevented from alienating lands forming part of the *dos* against the will of his wife: although the lands are his own through having been for the purpose of *dos* mancipated to him or passed by *cessio in iure*, or acquired by usucapion<sup>3</sup>. Whether this rule is confined to Italian lands or extends also to those in the provinces is a doubtful point.

64. On the other hand, the agnate curator of a madman can by a law of the 'Twelve Tables'<sup>4</sup> alienate the property of the madman: a *procurator*<sup>5</sup> likewise (can alienate what belongs to another), *i.e.* a person to whom absolute management is intrusted: a creditor also by special agreement may alienate a pledge, although the thing is not his own. But perhaps this

<sup>1</sup> Sc., If the *praediator* who buys from the populus *praediatura* of the land, do not take possession, the original *dominus* will get back his *dominium* by *usureceptio*.

<sup>2</sup> Lex Julia de adulteriis, temp. Augusti: Paul. S. R. II. 21 b. This law which originally applied only to lands in Italy was extended by Justinian to the provinces also, see Just. Inst. 2. 8. pr.

<sup>3</sup> For the law of *dos* see Ulpian, VI.

<sup>4</sup> The fragment of the law bearing on this topic (viz. Tab. V. l. 7), does not state this doctrine in so many words, but doubtless the rule given by Gaius was a direct consequence of the fact that this law gave the *potestas* over *furiosi* to the agnates. Cf. Cic. de Invent. Rhet. Lib. II. c. 50.

<sup>5</sup> IV.

fieri, quod voluntate debitoris intellegitur pignus alienari, qui olim pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur.

65. Ergo ex his quae diximus adparet quaedam naturali iure alienari, qualia sunt ea quae traditione alienantur; quaedam civili, nam mancipationis et in iure cessionis et usucapionis ius proprium est civium Romanorum.

66. Nec tamen ea tantum quae traditione nostra fiunt naturali nobis ratione adquiruntur, sed etiam *quae* occupando ideo *adquisierimus*, quia antea nullius essent: qualia sunt omnia quae terra, mari, coelo capiuntur. (67.) itaque si *feram* bestiam aut volucrem aut piscem *ceperimus*, *quidquid ita* captum fuerit, *id statim nostrum fit*, et eo usque nostrum esse intelligitur, donec nostra custodia coerceatur. cum vero custodiam nostram evaserit et in naturalem libertatem se receperit, rursus occupantis fit, quia *nostrum* esse desinit. naturalem autem liber-

alienation may be considered as taking place because the pledge is regarded as alienated by consent of the debtor, who originally agreed that the creditor should have power to sell the pledge, if the money were not paid<sup>1</sup>.

65. From what we have said, then, it appears that some things are alienated according to natural law, such as those alienated by ordinary delivery: some things according to the civil law, for the right originating from mancipation, or *cessio in iure* or usucapion, is peculiar to Roman citizens<sup>2</sup>.

66. But not only those things which become ours by delivery are acquired by us on natural principle, but also those which we acquire by occupation, on the ground that they previously belonged to no one: of which class are all things caught on land, in the sea, or in the air. 67. If therefore we have caught a wild beast, or a bird, or a fish, anything we have so caught at once becomes ours, and is regarded as being ours so long as it is kept in our custody<sup>3</sup>. But when it has escaped from our custody and returned into its natural liberty, it again becomes the property of the first taker, be-

<sup>1</sup> On which view it is no example of one man alienating what belongs to another.

<sup>2</sup> See Appendix (D).

<sup>3</sup> See Savigny, *On Possession*, p. 256, and also D. 41. 1. 3. 2 and 41. 1. 5. pr.

tatem recipere videtur, cum aut oculos nostros evaserit, aut licet in conspectu sit nostro, difficilis tamen eius rei persecutio sit.

68. In iis autem animalibus quae ex consuetudine abire et redire solent, veluti columbis et apibus, item cervis qui in silvas ire et redire solent, talem habemus regulam traditam, ut si revertendi animum habere desierint, etiam nostra esse desinant et fiant occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.

69. Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt.

70. Sed et id quod per adluvionem nobis adicitur eodem iure nostrum fit. per adluvionem autem id videtur adici quod ita paulatim flumen agro nostro adicit, ut aestimare non possumus quantum quoquo momento temporis adiciatur. hoc est quod volgo dicitur, per adluvionem id adici videri quod ita paulatim adicitur, ut oculos nostros fallat. (71.) Quod si flumen partem aliquam ex tuo praedio detraxerit et ad meum praedium attulerit, haec pars tua manet.

cause it ceases to be ours. And it is considered to recover its natural liberty when it has either gone out of our sight, or although it be still in our sight, yet its pursuit is difficult.

68. With regard to those animals which are accustomed to go and return habitually, as doves and bees, and deer, which are in the habit of going into the woods and coming back again, we have this rule handed down, that if they cease to have the intent of returning, they also cease to be ours and become the property of the first taker: and they are considered to cease to have the intent of returning when they have abandoned the habit of returning.

69. Those things also which are taken from the enemy become ours on natural principle.

70. That also which is added to us by alluvion becomes ours on the same principle. Now that is considered to be added by alluvion which the river adds so gradually to our land, that we cannot calculate how much is added at each instant: and hence the common saying, that that is regarded as added by alluvion which is added so gradually that it cheats our eyes. 71. But if the river rend away a portion of your field and conjoin it to mine, that portion remains yours.

*Title by*

72. At si in medio flumine insula nata sit, haec eorum omnium communis est qui ab utraque parte fluminis prope ripam praedia possident. si vero non sit in medio flumine, ad eos pertinet qui ab ea parte quae proxima est iuxta ripam praedia habent.

73. Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit, quia superficies solo cedit.

74. Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus terram complexa fuerit.

75. Idem contingit et in frumento quod in solo nostro ab aliquo satum fuerit. (76.) Sed si ab eo petamus fundum vel aedificium, et impensas in aedificium vel in seminaria vel in

72. If an island be formed in the middle of a river, it is the common property of all who have lands adjacent to the bank on either side of the river. But if it be not in the middle of the river, it belongs to those who have lands along the bank on that side which is the nearest.

73. Moreover that which is built on our ground by any one, even though he have built it in his own name (i.e. for himself) is ours by natural law, because the superstructure goes with the soil<sup>1</sup>.

74. Much more is this the case with a plant which a man has placed in our land, provided only it have laid hold of the earth with its roots.

75. The same is the case also with corn which has been sown on our land by any one. 76. But if we claim the land, and will not pay the expenses incurred upon the building or

<sup>1</sup> But if the builder had acted in *in fides* and had at the time the possession of the land, he could resist the action of the owner who refused to indemnify him, by an *exceptio doli mali*. He could, however, in no case bring an *actio ad exhibendum* to get back the actual building materials. But if the house were pulled down, then he was allowed to *vindicate* them, even if the period of usucapion for the house were com-

pleted, because "he who possesses an entirety, possesses the entirety only and not each individual part by itself." (Sav. *On Poss.* p. 193): so that the good title to the land would not have cured the bad title to the materials. If he had not possession, and if the house were not demolished, there is great doubt whether he had any remedy at all. D. 41. 1. 7. 12; D. 5. 3.

### *Title by accession.*

sementem factas ei solvere nolumus, poterit nos per exceptionem doli repellere; utique si bonae fidei possessor fuerit.

77. Eadem ratione probatum est, quod in chartulis sive membranis meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae chartulis sive membranis cedunt. itaque si ego eos libros easque membranas petam, nec impensam scripturae solvam, per exceptionem doli mali summoverti potero. (78.) Sed si in tabula mea aliquis pinxerit velut imaginem, contra probatur: magis enim dicitur tabulam picturae cedere. cuius diversitatis vix idonea ratio redditur. certe secundum hanc regulam si a me possidente petas imaginem tuam esse, nec solvas pretium tabulae, poteris per exceptionem doli mali summoverti. at si tu possideas, consequens est, ut utilis mihi actio adversum te dari debeat: quo casu nisi solvam impensam

seed, or plant, he can resist us by an *exceptio doli*<sup>1</sup>: at any rate if he be a possessor in good faith.

77. On the same principle the rule has been established that whatever any one has written on my paper or parchment, though it be in golden letters, is mine, because the letters are an accession to the paper or parchment. Therefore, if I claim those books and those parchments, and yet will not pay the expense of the writing, I can be resisted by an *exceptio doli mali*. 78. But if any one has painted on my tablet a likeness, to take an example, an opposite decision is given: for the more correct doctrine is that the tablet is an accession to the picture. For which difference scarcely any satisfactory reason can be given. No doubt, according to this rule, if you claim as your own the picture of which I am in possession, and yet will not pay the price of the tablet, you can be resisted by the *exceptio doli mali*. But if you be in possession, it follows that an *actio utilis*<sup>2</sup> ought to be allowed me against you: in which

<sup>1</sup> IV. 115 et seq. For "fructum," the reading of the MS. Huschke suggests "fundum." This appears a better reading, for we know that a *bona fide* possessor had a right to the fruits (see Savigny, *On Poss.* p. 201), and from the conclusion of the paragraph it is evident that Gaius is considering the case of a *bona fide* possessor, from whom the thing is reclaimed by the *dominus*. As

an one was treated equitably in one case, he probably would be in another.

<sup>2</sup> The cases wherein the Praetor gave actions were commonly analogous to cases where the *jus civile* gave actions. The action granted by the Praetor fell under the principle of some enactment of the *jus civile*, although it did not fall within its provision. Hence the name *utilis*, derived not from *uti* the verb, but

picturae, poteris me per exceptionem doli mali repellere, utique si bona fide possessor fueris. illud palam est, quod sive tu subripuisses tabulam sive alius, competit mihi furti actio.

79. In aliis quoque speciebus naturalis ratio requiritur: proinde si ex uvis *aut olivis aut spicis* meis vinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id vinum aut oleum aut frumentum, an tuum. item si ex auro aut argento meo vas aliquod feceris, aut ex meis tabulis navem aut armarium aut subsellium fabricaveris; item si ex lana mea vestimentum feceris, vel si ex vino et melle meo mulsum feceris, sive ex medicamentis meis emplastrum aut collyrium feceris: *quaeritur, utrum tuum sit id quod ex meo effeceris*, an meum. quidam materiam et substantiam spectandam esse putant, id est, ut

case if I do not pay the price of the picture, you can resist me by an *exceptio doli mali*, at any rate if you be a possessor in good faith. It is clear that if you or any one else have stolen the tablet, an action of theft lies for me.

79. In other instances also natural principles are resorted to. For instance, if you have made wine, or oil, or corn, out of my grapes, olives, or ears, the question arises whether that wine, oil, or corn is mine or yours<sup>1</sup>. Likewise, if you have made any vessel out of my gold or silver, or made a ship, or chest, or seat out of my planks: likewise, if you have made a garment out of my wool, or made mead out of my wine and honey, or a plaster or eye-salve out of my drugs: the question arises whether that which you have so made out of mine is yours or mine. Some think the material and substance are what ought to be regarded, i. e. that the thing made should be considered

the adverb, and meaning "analogous." The special circumstances of the present case are: (1) that it is a general rule that a *condictio* can only be brought by the *dominus*, the owner of the thing, when he is kept out of possession: (2) that *ipso iure* there is no separate property in an accession, so that one who claims the accession *not* through the principal thing is not a *dominus*, and hence has no action: therefore the *dominus* being in possession of the picture, the owner of the tablet

has by the civil law no action for his tablet. Here then is an opportunity for the Praetor to meet the spirit, and contravene the letter of the law, by granting to the latter an *actio utilis*. See Austin, II. 303. (II. 621, third edition.)

<sup>1</sup> The principles here stated are fully set out and in very similar language in D. 41. 1. 7. 7, which passage forms part of a long citation from another treatise of Gaius, viz. the *Liber Rerum quotidianarum sive Aurcorum*.

cuius materia sit, illius et res quae facta sit videatur esse; idque maxime placuit Sabino et Cassio. alii vero *cuius rem* esse putant qui fecerit; idque maxime diversae scholae auctoribus visum est: sed eum quoque cuius materia *et substantia* fuerit, furti adversus eum qui subripuerit habere actionem; nec minus adversus eundem condictionem ei competere, quia extinctae res, licet vindicari non possint, condici tamen furibus et quibusdam aliis possessoribus possunt.

#### DE PUPILLIS AN ALIQUID A SE ALIENARE POSSUNT.

80. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem Mancipi alienare posse; nec Mancipi vero feminam quidem posse, pupillum non posse. (81.) Ideoque si quando mulier mutuum pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet ea pecunia res nec Mancipi sit, contrahit obligationem. (82.) At

to belong to him to whom the materials belong: and this opinion found favour with Cassius and Sabinus<sup>1</sup>. But others think that the thing belongs to him who made it, (and this view rather is upheld by the authorities of the other school,) but that he to whom the material and substance belonged has an action of theft against him who took them away: and that he has in addition a condiction<sup>2</sup> against the same person, because things which have been destroyed, although they cannot be recovered by vindication, yet may be obtained by condiction from thieves and certain other possessors.

80. We must now be informed that neither a woman nor a pupil can without the authority of the tutor alienate a *res Mancipi*: a *res nec Mancipi* a woman can alienate, and a pupil cannot<sup>3</sup>. 81. Therefore in all cases where a woman lends money to any one without the authorization of her tutor, she contracts an obligation, for she makes the money the property of the recipient, inasmuch as money is a *res nec Mancipi*<sup>4</sup>.

<sup>1</sup> To which school Gaius himself belonged.

<sup>2</sup> IV. 2—5.

<sup>3</sup> Ulp. XI. 27.

<sup>4</sup> *Mutuum* is one of the contracts perfected by delivery in cases where

delivery passes the property: hence in this instance the *mutuum* is binding, money being a *res nec Mancipi*, and therefore capable of transfer by mere delivery. II. 80. See III. 90.

### Authorization of the Tutor.

si pupillus idem fecerit, quia *eam pecuniam non facit ac nullam* contrahit obligationem. unde pupillus vindicare quidem nummos suos potest, sicubi extent, id est *intendere suos ex iure Quiritium esse*; *mala fide consumptos vero ab eodem* repetere potest *quasi possideret*. unde de pupillo quidem quaeritur, an nummos quoque quos mutuos dedit, ab eo qui accipit *bona fide alienatos* petere possit, quoniam *is scilicet accipientis eos nummos facere videtur*. (83.) At ex contrario *res tam mancipi quam* nec mancipi mulieribus et pupillis *sine* tutoris auctoritate solvi possunt, quoniam meliorem condicionem suam facere iis etiam sine tutoris auctoritate concessum est. (84.) Itaque si debitor pecuniam pupillo solvat, facit quidem pecuniam pupilli, sed ipse non liberatur, quia nullam obligationem pupillus sine

82. But if a pupil have done the same, since he does not make the money the property of the recipient, he contracts no obligation. Therefore, the pupil can recover his money by vindication, as long as it is unconsumed, i.e. claim it to be his own *ex jure Quiritium*: and further, if it have been fraudulently consumed he can reclaim it from the recipient, just as though he were still in possession of it. Whence arises this question with regard to a pupil, viz. whether he can bring an action for money he has lent by way of *mutuum* against him who received it from him, after it has been transferred in good faith to another person; for the alienor seems to make the money the property of the recipient<sup>1</sup>. 83. But, on the other hand, both *res mancipi* and *res ne mancipi* can be paid<sup>2</sup> to women and pupils without the authorization of the tutor, because they are allowed to make their condition better even without their tutor's authorization. 84. Therefore, if a debtor pay money to a pupil, he makes the money the property of the pupil, but is not himself freed from obligation<sup>3</sup>, because the pupil can dissolve no obligation without the

<sup>1</sup> The case is one of *bona fide* alienation, and it is only *mala fide* alienation or consumption which draws with it the necessity of making compensation.

<sup>2</sup> *Solvere* means to discharge an obligation. It is difficult to hit upon a precise equivalent in English, because the *solutio* spoken of in this paragraph may be either *dare, facere,*

or *praestare*.

<sup>3</sup> This does not mean that the debtor would have to pay over again in all cases, as we see from the concluding paragraph of the section. The debtor having paid a person not fit to be entrusted with money, was liable in case any loss took place, or if the pupil wastefully expended what he had received. Just. Inst. II. 8. 2.



tutoris auctoritate dissolvere potest, quia nullius rei alienatio ei sine tutoris auctoritate concessa est. set tamen si ex ea pecunia locupletior factus sit, et adhuc petat, per exceptionem doli mali summoverti potest. (85.) Mulieri vero etiam sine tutoris auctoritate recte solvi potest: nam qui solvit, liberatur obligatione, quia res nec mancipi, ut proxime diximus, a se dimittere mulier et sine tutoris auctoritate potest: quamquam hoc ita est, si accipiat pecuniam; at si non accipiat, *sed* habere se dicat, et per acceptilationem velit debitorem sine tutoris auctoritate liberare, non potest.

86. Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipiove habemus; item per eos servos in quibus usumfructum habemus; item per homines liberos et servos alienos quos bona fide possidemus. de quibus singulis diligenter dispiciamus.

87. Igitur *quod* liberi nostri quos in potestate habemus, item quod servi *nostri* mancipio accipiunt, vel ex traditione nanciscuntur, sive quid stipulentur, vel ex aliquolibet causa ad-

authorization of the tutor, since without his tutor's authorization he is not allowed to alienate anything. But nevertheless if he have been made richer by means of this money, and yet sue for it again, he can be resisted by an *exceptio doli mali*.

85. Payment, however, can be legally made to a woman even without the authorization of her tutor: for he who pays is freed from obligation, since, as we have said above, a woman can part with *res nec mancipi* even without her tutor's authorization: although this is the case only if she receive the money: but if she do not receive it, but say she has it, and desire to free the debtor by *acceptilatio*<sup>1</sup>, without the authorization of her tutor, she cannot do so.

86. Property is acquired for us not only by our own means but also by means of those whom we have in *potestas*, *manus* or *mancipium*<sup>2</sup>: likewise, by means of those slaves in whom we have an usufruct: likewise, by means of free men and slaves of others whom we possess in good faith. These cases let us consider carefully one by one.

87. Whatever, therefore, our children, whom we have in  
and, likewise, whatever our slaves receive in *manci-*  
1, or obtain by delivery, or stipulate for<sup>3</sup>, or acquire in

quirunt, id nobis acquiritur: ipse enim qui in potestate nostra est nihil suum habere potest, et ideo si heres institutus sit, nisi nostro iussu, hereditatem adire non potest; et si iubentibus nobis adierit, hereditatem nobis acquirit proinde atque si nos ipsi heredes instituti essemus. et convenienter scilicet legatum per eos nobis acquiritur. (88.) dum tamen sciamus, si alterius in bonis sit servus, alterius ex iure Quiritium, ex omnibus causis ei soli *per* eum adquiri cuius in bonis est. (89.) Non solum autem proprietas per eos quos in potestate habemus acquiritur nobis, sed etiam possessio: cuius enim rei possessionem adepti fuerint, id nos possidere videmur. unde etiam per eos usucapio procedit.

90. Per eas vero personas quas in manu mancipiove habemus, proprietas quidem acquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt: an autem possessio

any way at all, is acquired for us: for he who is in our *potestas* can have nothing of his own; and therefore if he be instituted heir<sup>1</sup>, he cannot enter on the inheritance except by our command; and if he enter at our command, he acquires the inheritance for us just as though we had ourselves been instituted heirs. And in like manner, undoubtedly, a legacy is acquired for us by their means. 88. Let us, however, take notice that if a slave belong to one man *in bonis* and to another *ex jure Quiritium*, acquisition is in all cases made by his means for that one only to whom he belongs *in bonis*<sup>2</sup>. 89. And not only is ownership acquired for us by means of those whom we have in *potestas*, but possession also: for of whatever thing they have obtained possession, that thing we are considered to possess. Hence also usucapion takes effect through their means<sup>3</sup>.

90. Next, by means of those persons whom we have in *manus* or *mancipium*, ownership, no doubt, can be acquired for us in all cases, just as it can by those who are in our *potestas*: but whether possession can be acquired is generally ques-

<sup>1</sup> Ulpian, XIX. 19.

<sup>2</sup> II. 40. Ulp. XIX. 20. The owner *in bonis* has the *potestas*. 1. 54.

<sup>3</sup> Possession, however, is not acquired for another without that

other's knowledge and consent, although property may be: for the *animus domini* must exist not only in personal but also in derivative session, such as that of a slave for master. See Savigny, *On Poss.* §

adquiratur, quaeri solet, quia ipsas non possidemus. (91.) De his autem servis in quibus tantum usumfructum habemus ita placuit, ut quidquid ex re nostra vel ex operis suis adquirunt, id nobis adquiratur; quod vero extra eas causas, id ad dominum proprietatis pertineat. itaque si iste servus heres institutus sit legatumve quod ei datum fuerit, non mihi, sed domino proprietatis adquiritur. (92.) Idem placet de eo qui a nobis bona fide possidetur, sive liber sit sive alienus servus. quod enim placuit de usufructuario, idem probatur etiam de bona fide possessore. itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus sit. (93.) Sed si bonae fidei possessor usucaperit servum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest: usufructuarius vero usucapere non potest, primum quia non possidet, sed habet ius utendi et fruendi; deinde quia scit

tioned, because we do not possess the persons themselves<sup>1</sup>. 91. With regard to slaves in whom we have merely an usufruct, the rule is that whatever they acquire by means of our substance or their own labour is acquired for us<sup>2</sup>: but whatever from other sources than these, belongs to the owner of the property in them. Therefore, if such a slave be instituted heir or any legacy be left to him, it is acquired not for me but for the owner of the property. 92. The law is the same as to one who is possessed by us in good faith, whether he be free or the slave of another. For whatever holds good as to an usufructuary also holds good as to a possessor in good faith<sup>3</sup>. Therefore, whatever is acquired from causes other than these two, either belongs to the man himself, if he be free, or to his master, if he be a slave. 93. But if a possessor in good faith have got the slave by usucapion, since he thus becomes master, he can acquire by his means in every case: but an usufructuary cannot get by usucapion, firstly because he does not possess but has the right of usufruct, and secondly because he knows the slave to be

ly points out (*Traité de*  
p. 230) that if we could  
only acquire derivative possession  
through persons of whom we our-  
selves have possession, the father  
could not acquire through the son,  
nor the usufructuary through the

slave in whom he had the usufruct  
(§ 91). Gaius, consistently with him-  
self, raises a doubt as to the last-  
named case in § 94.

<sup>2</sup> Ulpian, XIX. 21.

<sup>3</sup> Ibid.

alienum servum esse. (94.) De illo quaeritur, an per eum servum in quo usumfructum habemus possidere aliquam rem et usucapere possumus, quia ipsum non possidemus. Per eum vero quem bona fide possidemus sine dubio et possidere et usucapere possumus. loquimur autem in utriusque personæ secundum distinctionem quam proxime exposuimus, id est si quid ex re nostra vel ex operis suis adquirant, id nobis acquiritur. (95.) Ex his apparet per liberos homines, quos neque iuri nostro subiectos habemus neque bona fide possidemus, item per alienos servos, in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri posse. *et hoc est quod dicitur per extraneam personam nihil adquiri posse, excepta possessione; de ea enim* quaeritur, an *per liberam personam* nobis adquiratur.

another's. 94. On the following point a question arises, viz. whether we can possess and get an usucaptive title to anything by means of a slave in whom we have the usufruct<sup>1</sup>, since we do not possess the slave himself. There is, however, no doubt that we can both possess and get by usucapion by means of a man whom we possess in good faith. But in both instances we are speaking with a reference to the qualification which we laid down just above, viz. that it is only what they acquire by our substance or their own work, which is acquired for us. 95. Hence it appears that in no case can anything be acquired for us by means of free men whom we neither have subject to our authority nor possess in good faith, nor by the slaves of other men in whom we have neither usufruct nor lawful possession. And hence comes the saying that nothing can be acquired for us through a stranger, except possession; for as to this it is questionable whether acquisition of it cannot be made for us by a free person<sup>2</sup>.

<sup>1</sup> According to D. 41. 2. 1. 8 and D. 41. 2. 49. pr. it is quite clear that the usufructuary could acquire through the slave in whom he had the usufruct. It may be that the law as laid down in those passages by Paulus and Papirius was not so laid down until after Gaius's time, when, as we see, the question was a

doubtful one.

<sup>2</sup> This passage in the text, it will be observed, is partly filled in conjecturally. To this circumstance alone can we attribute the undecided manner in which the possibility of acquiring by a free agent is asserted: for the fact of such acquisition being allowable is certain. The principal

96. In summa sciendum est iis qui in potestate manu mancipiove sunt nihil in iure cedi posse. cum enim istarum personarum nihil suum esse possit, conveniens est scilicet, ut nihil suum esse per se in iure vindicare possint.

97. Hactenus tantisper admonuisse sufficit quemadmodum singulae res nobis adquirantur. nam legatorum ius, quo et ipso singulas res adquirimus, opportunius alio loco referemus. Videamus itaque nunc quibus modis per universitatem res nobis adquirantur. (98.) Si cui heredes facti sumus, sive cuius bonorum possessionem petierimus, sive cuius bona emerimus, sive quem adrogaverimus, sive quam in manum ut uxorem receperimus, eius res ad nos transeunt.

99. Ac prius de hereditatibus dispiciamus, quarum duplex condicio est: nam vel ex testamento, vel ab intestato ad nos pertinent.

96. Finally, we must know that nothing can be passed by *cessio in iure* to those who are in *potestas*, *manus* or *mancipium*. For since these persons can have nothing of their own, it clearly follows that they cannot claim anything in court to be their own on an independent title (*per se*).

97. This much it is sufficient to have laid down at present as to the methods whereby particular things are acquired by us. For the law of legacies, whereby also we acquire particular things, we shall state more conveniently in another place<sup>1</sup>. Let us therefore now consider how things are acquired by us in the aggregate. 98. If then we have been made heirs to any man, or if we seek the possession of any man's goods<sup>2</sup>, or buy any man's goods<sup>3</sup>, or arrogate any man, or receive any woman into *manus* as a wife, the property of such person passes to us.

99. And first let us consider the subject of inheritances, of which there are two descriptions, for they devolve upon us either by testament or intestacy.

acquires through the agent at once and before he receives information of the transaction of the business if he gave a precedent *mandatum* (commission), but only after knowledge of the taking of possession and assent (*ratihabitio*), when

the agent is self-appointed (*procurator*). See Sav. *On Poss.* pp. 230—236.

<sup>1</sup> II. 191 et seqq.

<sup>2</sup> III. 32.

<sup>3</sup> III. 77.

100. Et prius est, ut de his dispiciamus quae nobis ex testamento obveniunt.

101. Testamentorum autem genera initio duo fuerunt. nam aut calatis comitiis faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est cum belli causa ad pugnam ibant: procinctus est enim expeditus et armatus exercitus. alterum itaque in pace et in otio faciebant, alterum in proelium exituri. (102.) Accessit deinde tertium genus testamenti, quod per aes et libram agitur. qui neque calatis comitiis neque in procinctu testamentum fecerat, is si subita morte urgebatur, amico familiam suam [id est patrimonium suum] mancipio dabat, eumque rogabat quid cuique post mortem suam dari vellet. quod testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur. (103.) Sed

100. The first thing is to consider about those things which come to us by testament.

101. Originally then there were two kinds of testaments<sup>1</sup>: for men either made them at the *calata comitia*<sup>2</sup>, which *comitia* were appointed twice in the year for the purpose of testaments being made; or *in procinctu*, i.e. when on account of war they were going out to fight: for *procinctus* means an army prepared and armed. The one kind, therefore, they made in peace and tranquillity, the other when going out to battle.

102. Afterwards there was added the third kind of testament which is solemnized by means of the coin and scale. For a man who had made his will neither at the *comitia calata* nor *in procinctu*, if threatened with sudden death, used to give his *familia* (i.e. his patrimony) in *mancipium* to some friend, and enjoin on him what he wished to be given to each person after his death. Which testament is called *per aes et libram*, clearly because it is solemnized by mancipation<sup>3</sup>. 103. But

<sup>1</sup> "Testamentum est mentis nostrae contestatio, in id sollemniter facta ut post mortem nostram valeat." Ulp. XX. 1.

<sup>2</sup> The *comitia* of which two meetings were set apart would, it is almost needless to say, be the *curiata*: as the plebeians had not in these early times risen into importance. The rule was that inheritances should de-

<sup>3</sup> according to law, and a Roman

could only have this rule relaxed in his own case by obtaining a special enactment (what would have been called at a later period a *privilegium*) at the assembly of the nation, either of the whole of it, the *comitia*, or in cases of emergency such portion as could readily be collected, the *procinctus*.

<sup>4</sup> Ulpian, XX. 2.

quidem duo genera testamentorum in desuetudinem abierunt; hoc vero solum quod per aes et libram fit in usu retentum est. sane nunc aliter ordinatur atque olim solebat. namque olim familiae emptor, id est qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator, quid cuique post mortem suam dari vellet. nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia propter veteris iuris imitationem familiae emptor adhibetur. (104.) *Eaque* res ita agitur. Qui facit *testamentum*, adhibitis, sicut in ceteris mancipationibus, v testibus civibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam; in qua re his verbis familiae emptor utitur: *FAMILIAM PECUNIAMQUE TUAM ENDO MANDATELA TUTELA CUSTODELAQUE MEA ESSE AIO, EAQUE, QUO TU IURE TESTAMENTUM FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE*, et ut quidam adiciunt *AENEAQUE LIBRA, ESTO MIHI EMPTA*. deinde

the two first-mentioned kinds of testament have fallen into disuse: and that alone is retained in use which is solemnized *per aes et libram*. It is, however, now made in another way from that in which it used to be made. For formerly the *familiae emptor*, i.e. he who received the *familia* in *mancipium* from the testator, held the place of heir, and therefore the testator charged him with what he wished to be given to each person after his death. But now one person is appointed heir in the testament, and on him the legacies are charged, and another, as a mere form and in imitation of the ancient law, is employed as *familiae emptor*. 104. The business is effected thus. The man who is making the testament, having called together, as in all other mancipationes, five witnesses, Roman citizens of puberty, and a *libripens*<sup>1</sup>, after writing the tablets of his testament, mancipates his *familia* for form's sake to some one: at which point the *familiae emptor* makes use of these words: "I declare your patrimony and money to be in my charge, guardianship and custody: and in order that you may be able to make a testament duly according to public law, be they bought by me with this coin, and," as some add, "with this copper balance." Then he strikes the balance

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<sup>1</sup> Ulpian, xx. 2.

aere percutit libram, idque aes dat testatori velut pretii loco. deinde testator tabulas testamenti tenens ita dicit: HAEC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT ITA DO, ITA LEGO, ITA TESTOR, ITAQUE VOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE. et hoc dicitur nuncupatio. nuncupare est enim palam nominare; et sane quae testator specialiter in tabulis testamenti scripserit, ea videtur generali sermone nominare atque confirmare.

105. In testibus autem non debet is esse qui in potestate est aut familiae emptoris aut ipsius testatoris, quia propter veteris iuris imitationem totum hoc negotium quod agitur testamenti ordinandi gratia creditur inter familiae emptorem agi et testatorem: quippe olim, ut proxime diximus, is qui familiam testatoris mancipio accipiebat, heredis loco erat. itaque reprobatum est in ea re domesticum testimonium. (106.) Unde et si is qui in potestate patris est familiae emptor adhibitus sit, pater eius testis esse non potest; at ne is quidem qui in eadem

with the coin, and gives that coin to the testator by way of price, as it were. The testator next, holding the tablets of the testament, speaks thus: "These things, just as they are written in these tablets of wax, I so give, I so bequeath, and I so claim your evidence, and do you, Quirites, so afford it me<sup>1</sup>." And this is called the *nuncupatio*: for to nuncupate is to declare openly: and whatever the testator has written in detail on the tablets of his testament, he is regarded as declaring and confirming by this general statement.

105. Amongst the witnesses there ought not to be any one who is in the *potestas* either of the *familiae emptor* or of the testator himself, since in imitation of the old law all this business which is done for the purpose of making the testament is regarded as taking place between the *familiae emptor* and the testator: because in olden times, as we have just stated, he who received the *familia* of the testator in *mancipium* was in the place of heir. Therefore the evidence of members of the same family was refused in the matter<sup>2</sup>. 106. Hence also, if he who is in the *potestas* of his father be employed as *familiae emptor*, his father cannot be a witness<sup>3</sup>: neither can he who is in the same *potestas*, his brother for

<sup>1</sup> Ulpian, xx. 9.

<sup>2</sup> Ibid. 3.

<sup>3</sup> Ibid. 4, 5.



potestate est, velut frater eius. Sed si filiusfamilias ex castrensi peculio post missionem faciat testamentum, nec pater eius recte testis adhibetur, nec is qui in potestate patris sit. (107.) De libripende eadem quae et de testibus dicta esse intellegemus; nam et is testium numero est. (108.) Is vero qui in potestate heredis aut legatarii est, cuiusve heres ipse aut legatarius in potestate est, quique in eiusdem potestate est, adeo testis et libripens adhiberi potest, ut ipse quoque heres aut legatarius iure adhibeantur. sed tamen quod ad heredem pertinet quique in eius potestate est, cuiusve is in potestate erit, minime hoc iure uti debemus.

instance. And if a *filius familias* make a testament regarding his *castrense peculium*<sup>1</sup> after his dismissal from service, his father cannot properly be employed as a witness<sup>2</sup>, nor one who is in the *potestas* of his father. 107. We shall consider that what has been said about the witnesses is also said about the *libripens*: for he too is in the number of the witnesses. 108. But a man who is in the *potestas* of the heir or a legatee, or in whose *potestas* the heir or a legatee himself is, or who is in the same *potestas* (with either of them), may so certainly be employed as a witness or *libripens*, that even the heir or legatee himself may be lawfully so employed. Yet so far as concerns the heir, or one who is in his *potestas*, or one in whose *potestas* he is, we ought to make use of this right very sparingly<sup>3</sup>.

<sup>1</sup> Ulpian, XX. 10. *Peculium* originally meant property of the *paterfamilias* held on his sufferance by the son or slave, and which he could take from them at his pleasure. *Peculium castrense* dates from the time of Augustus: soldiers in *potestate parentis* were by enactment of that emperor allowed to have an independent property in their acquisitions made on service, and the rule that the property of a son was the property of the father (II. 87) was set aside in this case. If the testament were made during service, no formalities were needed (II. 109); hence the words "post missionem"

are inserted in the text.

<sup>2</sup> Marcellus, with whom Ulpian apparently agrees, held that a father could be made witness to a testament of a *filius familias* respecting his *castrense peculium*. See D. 28. 1. 20. 2.

<sup>3</sup> The transaction, as Gaius tells us (II. 105), was still regarded as one between the testator and the *familiae emptor*, and yet people were gradually beginning to see that this was but a fiction, and that the real parties were the testator and the heir; hence the caution at the end of II. 108, which Justinian subsequently transformed into a law. *Inst.* II. 10. 10.

## *Military testaments.*

### E TESTAMENTIS MILITUM.

109. *Sed* haec diligens observatio in ordinandis testamentis militibus propter nimiam inperitiam *constitutionibus* Principum remissa est. nam quamvis neque legitimum numerum testium *adhibuerint*, neque vendiderint familiam, neque nuncupaverint testamentum, recte nihilominus testantur. (110.) Praeterea permissum est iis et peregrinos et Latinos instituere heredes vel iis legare; cum alioquin peregrini quidem ratione civili prohibeantur capere hereditatem legataque, Latini vero per legem Iuniam. (111.) Caelibes quoque qui lege Julia hereditatem legataque capere vetantur, item *orbi*, id est qui liberos non habent, quos lex *Papia plus quam semissem capere* prohibet [23 *lin.*].

112. *Sed senatus dico Hadriano auctore, ut supra*

109. But these strict regulations as to the making of testaments have been relaxed by constitutions of the Emperors in the case of soldiers, on account of their great want of legal knowledge. For their testaments are valid, though they have neither employed the lawful number of witnesses, nor sold (manipated) their *familia*, nor nuncupated their testament<sup>1</sup>. 110. Moreover, they are allowed to institute foreigners or Latins as their heirs, or to leave legacies to them: although, in other cases, foreigners are prohibited by the civil law from taking inheritances, and Latins by the Lex Junia<sup>2</sup>. 111. Unmarried persons also, who by the Lex Julia<sup>3</sup> are forbidden to take an inheritance or legacies, also *orbi*, *i.e.* those who have no children, whom the Lex Papia prevents from taking more than half the inheritance (can be appointed heirs by soldiers).....

112. But the senate, at the instance of the late emperor

<sup>1</sup> The testaments of soldiers made irregularly were only valid for one year after their leaving the service. Ulpian, XXIII. 10.

<sup>2</sup> I 23. The prohibition of Latins was not absolute. See Ulpian, XXII. 3.

<sup>3</sup> The *Lex Julia de maritandis ordinibus* (temp. Augusti) is meant. *Coelibes* could by that law take what was bequeathed to them only in case they married within 100 days from

the time when they became entitled. Ulpian, XVII. 1. The Lex Julia was enacted A.D. 4, but it did not come into operation till A.D. 10, in which year the Lex Papia Poppaea was also passed. The two laws being thus connected both in their object and their date are generally spoken of together, and sometimes, though not quite correctly, as if they were one law, *Lex Julia et*

, *mulieribus etiam coemptione non facta testamentum facere permisit, si modo maiores facerent annorum XII tutore auctore*; scilicet ut quae tutela liberatae non essent ita testari deberent. (113.) Videntur ergo melioris conditionis esse feminae quam masculi: nam masculus minor annorum XIII testamentum facere non potest, etiamsi tutore auctore testamentum facere velit; femina vero post XII annum testamenti faciendi ius nanciscitur.

114. Igitur si quaeramus an valeat testamentum, inprimis advertere debemus an is qui id fecerit habuerit testamenti factionem: deinde si habuerit, requiremus an secundum iuris civilis regulam testatus sit; exceptis militibus, quibus propter nimiam imperitiam, ut diximus, quomodo velint vel quomodo possint, permittitur testamentum facere.

Hadrian (as we stated above also), allowed women to make a testament, even though they had not entered into a *coemptio*<sup>1</sup>, provided only they were above twelve years of age and made it with the authorization of their tutor; that is, (the senate ruled) that women not freed from *tutela* should so make their testaments<sup>2</sup>. 113. Women, therefore, seem to be in a better position than men: for a male under fourteen years of age cannot make a testament, even though he desire to make it with the authorization of his tutor: but a woman obtains the right of making a testament after her twelfth year<sup>3</sup>.

114. If then we are considering whether a testament be valid, we first ought to consider whether he who made it had *testamenti factio*<sup>4</sup>: then, if he had it, we shall enquire whether he made the testament according to the rules of the civil law: except in the case of soldiers, who, as we have stated, on account of their great want of legal knowledge, are allowed to make a testament as they will and as they can. •

<sup>1</sup> l. 115 a.

<sup>2</sup> For the circumstances under which women are freed from *tutela* see l. 194.

<sup>3</sup> Ulpian, XX. 12, 15.

<sup>4</sup> *Testamenti factio* is used in three senses:

(1) The legal power of making a will:

(2) The legal power of taking

under a will:

(3) The legal capacity of being a witness to a will.

The phrase is here used in the first sense. All persons *sui juris* except *dediticii* (l. 25, III. 75) had this *testamenti factio*. Persons not *sui juris* might have it in the other two senses.

115. Non tamen, ut iure civili *valeat* testamentum, sufficit ea observatio quam supra exposuimus de familiae venditione et de testibus et de nuncupationibus. (116.) Ante omnia requirendum est an institutio heredis sollemni more facta sit: nam aliter facta institutione nihil proficit familiam testatoris ita venire, testes<sup>1</sup> ita adhibere, aut nuncupare testamentum, ut supra diximus. (117.) Sollemnis autem institutio haec est: TITUS HERES ESTO. sed et illa iam conprobata videtur: TITIUM HEREDEM ESSE IUBEО. at illa non est conprobata: TITIUM HEREDEM ESSE VOLO. set et illae a plerisque improbatae sunt: HEREDEM INSTITUO, item HEREDEM FACIO.

118. Observandum praeterea est, ut si mulier quae in tutela sit faciat testamentum, tutoris *auctoritate* facere debeat: alioquin inutiliter iure *civili* testabitur. (119.) Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti *bonorum possessionem* pollicetur: et si nemo sit ad quem ab intestato iure legitimo perti-

115. But to make a testament valid by the civil law, the observances which we have explained above as to the sale of the *familia* and the witnesses and the nuncupations, are not sufficient. 116. Above all things, we must enquire whether the institution of the heir was made in solemn form: for if it have been made otherwise, it is of no avail for the *familia* of the testator to be sold, or to call in witnesses, or to nuncupate the testament, in the manner we have stated above. 117. The solemn form of institution is this: "Titus be heir." But this also seems approved: "I order Titius to be heir." This, however, is not approved: "I wish Titius to be heir." These, too, are generally disapproved: "I institute heir," and "I make heir<sup>1</sup>."

118. We must further observe that if a woman who is in *tutela* make a testament, she ought to make it with the authorization of her tutor: otherwise she will make a testament invalid at the civil law<sup>2</sup>. 119. The Praetor, however, if the testament be sealed with the seals of seven witnesses, promises to the written heirs possession of the property in accordance with the testament: and if there be no person to whom the inheritance belongs on

<sup>1</sup> The form to be solemn must be statement. Ulpian, XXI.  
imperative, not precative or a mere <sup>2</sup> II. 112.

neat hereditas, velut frater eodem patre natus aut patruus aut fratris filius, ita poterunt scripti heredes retinere hereditatem. nam idem iuris est et si alia ex *causa* testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit. (120.) Sed videamus an *non*, etiamsi frater aut patruus extent, potiores scriptis heredibus habeantur. rescripto enim Imperatoris Antonini significatur, eos qui secundum tabulas testamenti non iure factas bonorum possessionem petierint, posse adversus eos qui ab intestato vindicant hereditatem defendere se per exceptionem doli mali. (121.) quod sane quidem ad masculorum testamenta pertinere certum

intestacy by statutable right<sup>1</sup>, as a brother born from the same father, or a father's brother, or a brother's son, the written heirs will in such a case retain the inheritance<sup>2</sup>. The rule is the same if the testament be invalid from other causes, as for instance, because the *familia* has not been sold, or because the testator has not spoken the words of nuncupation<sup>3</sup>. 120. But let us consider whether or not, supposing a brother or father's brother exist, they will be considered to have a better title than the written heirs. For it is laid down in a rescript of the emperor Antoninus, that those who claim possession of goods in accordance with a testament not made in due form, can defend themselves by an *exceptio doli mali*<sup>4</sup> against those who claim the inheritance by intestacy<sup>5</sup>. 121. That this (rescript)

*iure* = by right based on the law of the Twelve Tables, or some subsequent *lex*.

<sup>1</sup> II. 113. Ulpian, XXIII. 6. The wording here is rather loose: a *bonorum possessor* could not be heir, for the heir is marked out by law, and if the law did not recognize a person in that capacity, the praetor's grant of *bonorum possessio* was unable to give him heirship, although it did give him the benefits of heirship. Hence "hereditatem" should have been "res hereditarias," or "bona testatoris."

The Roman law of inheritance was so very meagre, omitting for instance all reference to cognates, and the rights of emancipated children, &c., that the praetors

found themselves obliged to supplement the law by these grants of *bonorum possessio*, whereby they sometimes prevented an inheritance becoming ownerless, and in other cases left the bare name of heir to the person marked out by law, but gave the practical benefits of the succession to one more justly entitled either on natural grounds, as for instance by relationship, or on account of the expressed wish of the testator, when the testator did not pass over some person on whose appointment the law insisted.

<sup>2</sup> See on this point D. 37. 11. 1. 8, where several cases of this nature are examined.

<sup>4</sup> IV. 115, 116.

<sup>5</sup> The rules about *præteritio* (see

est, item ad feminarum quae ideo non utiliter testatae sunt, quod verbi gratia familiam non vendiderint aut nuncupationis verba locutae non sint: an autem et ad ea testamenta feminarum quae sine tutoris auctoritate fecerint haec constitutio pertineat, videbimus. (122.) Loquimur autem de his scilicet feminis quae non in legitima parentium aut patronorum tutela sunt, sed de his quae alterius generis tutores habent, qui etiam inviti coguntur auctores fieri: alioquin parentem et patronum sine auctoritate eius facto testamento non summoventi palam est.

123. Item qui filium in potestate habet curare debet, ut eum vel heredem instituat vel nominatim exheredet; alioquin si eum silentio praeterierit, inutiliter testabitur: adeo quidem, ut nostri praeceptores existiment, etiamsi vivo patre filius defunctus sit, neminem heredem ex eo testamento existere posse,

applies to testaments of men is certain: also to those of women who have made an invalid testament, because, for instance, they have not sold their *familia*, or have not spoken the words of nuncupation: but whether the constitution also applies to those wills of women which they have made without authorization of the tutor, is a matter for us to consider.

122. But we are speaking about those women, of course, who are not in the *tutela legitima* of parents or patrons, but who have tutors of another kind, who are compelled to authorize even against their will: that in the other case, a parent or a patron cannot be set aside by a testament made without his authorization is plain<sup>1</sup>.

123. Likewise, he who has a son in his *potestas*, must take care either to appoint him heir or to disinherit him by name<sup>2</sup>: otherwise, if he pass him over in silence, the testament will be void: so that, according to the opinion of our authorities, even if the son die in the lifetime of the father, no heir can exist under that testament, that is, because the institution

§ 123 et seqq.) do not apply to any but descendants, so that the written heirs are preferred to a brother or father's brother. Under Justinian's legislation, however, the brother sometimes could wrest the possession from them. Just. Inst. II. 18. 1.

<sup>1</sup> This paragraph is an answer to the question implied in "videbimus"

at the end of § 121. The testaments of women under fiduciary tutors will be supported by the praetor's grant of *bonorum possessio secundum tabulas*, but not those of women in *tutela legitima*. See I. 192.

<sup>2</sup> Ulpian, XXII. 14—23, and Cic. *De Oratore*, I. 38 apud finem.

scilicet quia statim ab initio non constiterit institutio. sed diversae scholae auctores, siquidem filius mortis patris tempore vivat, sane impedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur: si vero ante mortem patris interceptus sit, posse ex testamento hereditatem adiri putant, nullo iam filio impedimento; quia scilicet existimant *non* statim ab initio inutiliter fieri testamentum filio praeterito. (124.) Ceteras vero liberorum personas si praeterierit testator, valet testamentum. praeteritae istae personae scriptis heredibus in partem adcrescunt: *si sui instituti sint* in virilem; si extranei, in dimidiam. id est si quis tres verbi gratia filios heredes instituerit et filiam praeterierit, filia adcrescendo pro quarta parte fit heres; *placuit enim eam tuendam esse pro ea parte, quia etiam ab intestato eam partem habitura esset.* at si extraneos ille heredes instituerit et filiam praeterierit, filia adcrescendo ex dimidia parte fit heres. Quae de filia diximus, eadem *et*

was invalid from the very beginning. But the authors of the opposite school admit that if the son be alive at the time of the father's death he undoubtedly stands in the way of the written heirs, and becomes heir by intestacy: but they think that if he die before the death of his father, the inheritance can be entered upon in accordance with the testament, the son being now no hindrance: that is, because they think that when a son is passed over, the testament is not invalid from the very beginning. 124. But if the testator pass over other classes of descendants, the testament stands good. These persons so passed over attach themselves to the written heirs for a portion; for a proportionate share, if *sui heredes* have been appointed heirs<sup>1</sup>: for a half, if strangers have been appointed. That is, if a man have, for example, instituted three sons as heirs and passed over a daughter, the daughter by attachment becomes heir to one-fourth: for it has been settled that she is to be protected to this extent, because she would also have had that amount by intestacy. But if the man have instituted strangers as heirs and passed over a daughter, the daughter by attachment becomes heir to one-half. All that we have said as to a daughter we shall consider

<sup>1</sup> II. 156. Ulp. XXII. 17.

deque omnibus liberorum personis, sive masculini  
feminini sexus, dicta intellegemus. (125.) Quid ergo est?  
licet *feminae* secundum *ea quae* diximus scriptis heredibus dimi-  
diam partem *tantum* detrahant, tamen Praetor eis contra tabulas  
honorum possessionem promittit, qua ratione extranei heredes  
a tota hereditate repelluntur: et efficeretur *sane per hanc*  
honorum possessionem, *ut* nihil inter feminas et masculos inter-  
esset: (126.) *sed* nuper Imperator Antoninus significavit re-  
scripto *suas* non plus nancisci feminas per honorum posses-  
sionem, quam quod iure adcrescendi consequerentur. quod in  
emancipatis *feminis similiter obtinet, scilicet ut quod* adcrescendi  
iure habiturae essent, si *suae* fuissent, id ipsum etiam per bono-  
rum possessionem habeant. (127.) Sed si *quidem* filius a patre  
exheredetur, nominatim *exheredari* ante — — — — — potest

to be also said of a grandson and all classes of descendants,  
whether of the male or female sex. 125. What means this  
then? Although women, according to what we have said, take  
away only one half from the written heirs, yet the Praetor  
promises them possession of all the goods in spite of the testa-  
ment, by which means the stranger heirs are debarred from  
the entire inheritance: and through this possession of goods,  
the effect would be that no difference would exist between  
men and women. 126. But lately the Emperor Antoninus has  
decided by a rescript that women who are *suae heredes*, are to  
obtain no more by possession of goods than they would obtain  
by right of attachment<sup>1</sup>. A rule which applies in like manner  
to emancipated women, so that they are to have by possession  
of goods exactly what they would have had by right of at-  
tachment if they had been *suae heredes*. 127. But if a  
son be disinherited by a father, he must be disinherited by  
name<sup>2</sup>..... A man is considered to be disinherited by name,

<sup>1</sup> "That they are to have no more  
by the aid of the praetor than is given  
to them by the *jus civile*." Cf. Theo-  
philus, II. 13. 3.\* These points and  
the amending rescript of Antoninus  
are noticed at considerable length in  
the Code 6. 28. 4, and we perceive  
that the matter still gave rise to con-  
troversy even in Justinian's time.  
That emperor effected a final settle-

ment of the dispute by a rescript of  
the date 531 A.D.

<sup>2</sup> Bocking proposes to continue the  
passage "before the appointment of  
the heir (*i. e.* in a part of the will  
preceding the appointment of heir),  
or in the midst of the appointments  
of the heirs (if there be several), but  
he cannot in any case be disinherited  
by a general clause (*inter*



exheredari. nominatim autem exheredari videtur sive ita exheredetur: *TITIUS FILIUS MEUS EXHERES ESTO, sive ita: FILIUS MEUS EXHERES ESTO*, non adiecto proprio nomine. (128.) *Masculorum ceterorum personae vel feminini sexus aut nominatim exheredari possunt, aut inter ceteros, velut hoc modo: CETERI EXHEREDES SUNTO: quae verba post institutionem heredum adici solent. sed haec ita sunt iure civili.* (129.) Nam Praetor omnes virilis sexus, tam *filios quam ceteros*, id est nepotes quoque et pronepotes *nominatim exheredari iubet, feminini vero inter ceteros: qui nisi fuerint ita exheredati, promittit eis contra tabulas bonorum possessionem.* (130.) Postumi quoque *liberi vel heredes institui debent vel exheredari.* (131.) Et *in eo par omnium condicio est, quod et in filio postumo et in quolibet ex ceteris liberis, sive feminini sexus sive masculini, praeterito, valet quidem testamentum, sed postea adgnatione postumi sive*

if he be either disinherited in these words: "Be my son, Titius, disinherited;" or in these: "Be my son disinherited," without the addition of his proper name. 128. Other males or any females may be disinherited either by name or in a general clause, for instance thus: "Be all others disinherited:" words which are usually added after the institution of the heirs. But these things are so by the civil law only. 129. For the Praetor orders all of the male sex, both sons and others, *i.e.* grandsons also and great-grandsons, to be disinherited by name, but women by a general clause: and if they be not thus disinherited, he promises them possession of the goods contrary to the testament. 130. Posthumous descendants also must either be appointed heirs or disinherited. 131.<sup>1</sup> And in this respect the condition of all of them is the same, that when a posthumous son or any other descendant, whether male or female, is passed over, the testament is still valid, but

The meaning of the last sentence is that he must be named; no general proviso, such as "*ceteri exheredes sunt*," will suffice to bar him.

We may here remark that the disinheriting of sons or descendants was not allowed to a testator unless he had good cause for setting them aside. In many cases (see Just.

II. 18) children so disinherited could bring the *querela inofficiosi testamenti*, "complaint of the will not being in accordance with natural affection," and have it annulled.

<sup>1</sup> A considerable portion of the MS. is lost at this point, and §§ 131--134 are supplied from Justinian's *Institutes*. See Ulpian, XXII. 21, 22.

*postumae rumpitur, et ea ratione totum infirmatur: ideoque si mulier ex qua postumus aut postuma sperabatur abortum fecerit, nihil impedimento est scriptis heredibus ad hereditatem adeundum.*

(132.) *Sed feminini quidem sexus postumae vel nominatim vel inter ceteros exheredari solent. dum tamen si inter ceteros exheredentur, aliquid eis legatur, ne videantur per oblivionem praeteritae esse: masculos vero postumos, id est filium et deinceps, placuit non aliter recte exheredari, nisi nominatim exheredentur, hoc scilicet*

*QUICUMQUE MIHI FILIUS GENITUS FULKIT, EXHERES*

(133.) *Postumorum loco sunt et hi qui in sui heredis locum sumpendo quasi adgnascendo fiunt parentibus sui heredes. ut ecce si filium et ex eo nepotem neptemque in potestate habeam, quia filius gradu praecedit, is solus iura sui heredis habet, quamvis nepos quoque et neptis ex eo in eadem potestate sint; sed si filius meus*

is made void subsequently by the *agnation*<sup>1</sup> of the posthumous son or daughter, and thus becomes utterly inoperative<sup>2</sup>. And therefore, if a woman, from whom a posthumous son or daughter is expected, miscarry, there is nothing to prevent the written heirs from entering on the inheritance. 132. Posthumous females may be disinherited either by name or in a general clause; provided only that if they be disinherited by a general clause, something be left them as a legacy, that they may not seem passed over through forgetfulness. But it has been ruled that posthumous males, *i.e.* a son, &c., cannot be duly disinherited except they be disinherited by name, that is, in this manner, "Whatever son shall be born to me, let him be disinherited." 133. Those are reckoned as posthumous children, who, by succeeding into the place of a *sui heres*, become heirs to their ascendants by *quasi-agnation*. For instance, if any man have in his *potestas* a son and a grandson or granddaughter by him, the son alone has the rights of *sui heres*, because he is prior in degree, although the grandson also and granddaughter by him are in the same *potestas*: but

<sup>1</sup> By *agnatio* is merely meant the fact of becoming an *agnatus*, which might be either by birth or adoption, or, as in the present case, by conception, for when there is a *conubium* the child follows his father's condition and his rights vest at the time

of conception (l. 89). Therefore the testator passes over a *sui heres*, as the child's rights extend back into the testator's lifetime.

<sup>2</sup> See Ulp. xxiii. 3; Cic. *De Oratore*, l. 57, and *Pro Caecina*. c. 25.

*me vivo moriatur, aut qualibet ratione exeat de potestate mea, incipit nepos neptisve in eius locum succedere, et eo modo iura suorum heredum quasi adgnatione nancisci. (134.) Ne ergo eo modo rumpat mihi testamentum, sicut ipsum filium vel heredem instituere vel exheredare nominatim debeo, ne non iure faciam testamentum, ita et nepotem neptemve ex eo necesse est mihi vel heredem instituere vel exheredare, ne forte, me vivo filio mortuo, succedendo in locum eius nepos neptisve quasi adgnatione rumpat testamentum: idque lege Iunia Velleia provisum est; qua simul cavetur, ut illi tanquam postumi, id est virilis sexus nominatim, feminini vel nominatim vel inter ceteros exheredentur, dum tamen iis qui inter ceteros exheredantur aliquid legetur.*

135. *Emancipatos liberos iure civili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes. sed Praetor omnes, tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, virilis sexus filios et ulterioris*

if my son die in my lifetime, or depart from my *potestas* by any means, the grandson or granddaughter at once succeeds into his place, and so obtains the rights of a *sui heres* by *quasi-agnation*. 134. Therefore, to prevent him or her from thus making my testament void, it is necessary for me to appoint as heir or disinherit the grandson or granddaughter by my son, just as I ought to appoint as heir or disinherit by name the son himself to prevent me from making an illegal testament: lest, perchance, if my son die in my lifetime, the grandson or granddaughter by succeeding into his place should make void my testament by the quasi-agnation: and this is provided by the *Lex Junia Velleia*<sup>1</sup>: wherein there is also a direction, that these quasi-agnates are to be disinherited in the same way as posthumous children, *i.e.* males by name, females either by name or in a general clause, provided only that some legacy be left to those disinherited in a general clause.

135. According to the civil law it is not necessary either to appoint as heirs or disinherit emancipated children, because they are not *sui heredes*. But the Praetor orders all, both males and females, to be disinherited, if they be not instituted heirs, sons and more remote descendants of the male sex by name,

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<sup>1</sup> Passed A.D. 10.

*nominatim, feminini* vero inter ceteros. *quodsi* neque heredes instituti fuerint, neque *ita*, ut supra diximus, exheredati, Praetor promittit eis contra tabulas bonorum possessionem. (135a.) In potestate patre *constituto*, qui inde nati sunt, nec in accipienda *bonorum possessione* patri concurrunt qui possit eos in potestate habere; aut si petitur, non impetrabitur. namque per *ipsum patrem suum* prohibetur. nec differunt *emancipati et sui*.

136. *Adoptivi*, quamdiu tenentur in adoptionem, naturalium loco sunt: emancipati vero a patre adoptivo neque iure civili, neque quod ad edictum Praetoris pertinet, *inter liberos numerantur*. (137.) qua ratione accidit, ut ex diverso, quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiva familia, extraneorum numero habeantur. *cum vero emancipati fuerint ab adoptivo patre, tunc incipiant* in ea causa esse qua futuri essent, si ab ipso naturali patre *emancipati* fuissent.

descendants of the female sex in a general clause<sup>1</sup>. But if they be neither instituted heirs, nor disinherited in the manner we have stated above, the Praetor promises them possession of the goods contrary to the testament. 135 a. The children of a father subject to *potestas* do not take a possession of goods concurrently with their father, if he can have them in his *potestas*: and if they put in a claim it will not be allowed. For they are barred by their father himself, and whether they be emancipated or be *sui heredes* makes no difference<sup>2</sup>.

136. Adopted children, so long as they are held in adoption, are in the place of actual children: but when emancipated by their adoptive father, they are not accounted as his children either by the civil law or by the provisions of the Praetor's edict. 137. From which principle it follows, on the other hand, that in respect of their actual father they are considered in the light of strangers so long as they are in the adoptive family. But when they have been emancipated by the adoptive father, they begin to be in the position in which they would have been, if emancipated by the actual father himself<sup>3</sup>.

<sup>1</sup> Ulpian, XXII. 23.

<sup>2</sup> Since the father can have them in his *potestas*, it has to be explained how they can be *emancipati*. It

should be noticed that Huschke is strongly inclined to leave out this passage as a corrupt interpolation.

<sup>3</sup> Therefore the praetor will grant

138. Si quis post factum testamentum adoptaverit sibi filium, aut per populum eum qui sui iuris est, aut per Praetorem eum qui in potestate parentis fuerit, omnimodo testamentum eius rumpitur quasi adgnatione sui heredis. (139.) Idem iuris est si cui post factum testamentum uxor in manum conveniat, vel quae in manu fuit nubat: nam eo modo filiae loco esse incipit et quasi sua est. (140.) Nec prodest sive haec, sive ille qui adoptatus est, in eo testamento sit institutus institutave. nam de exheredatione eius supervacuum videtur quaerere, cum testamenti faciendi tempore suorum heredum numero non fuerit. (141.) Filius quoque qui ex prima secundave mancipatione manumittitur, quia revertitur in potestatem patriam, rumpit

138. If any man, after making a testament, adopt a son, either one who is *sui iuris* by authority of the *populus*, or one who is in the *potestas* of an ascendant by authority of the Praetor<sup>1</sup>, his testament is in all cases invalidated by this quasi-agnation of a *suus heres*. 139. The rule is the same if a man take a wife in *manus* after making a testament, or if a woman already in his *manus* be married to him: for in this way she begins to be in the place of a daughter<sup>2</sup>, and is a *quasi sua heres*. 140. Nor does it matter if such a woman, or a man who is adopted, be instituted heir in that testament. For as to disinheriting, it is superfluous to make enquiry, since at the time the testament was made they were not of the class of *sui heredes*<sup>3</sup>. 141. A son also who is manumitted after a first or second mancipation<sup>4</sup>, invalidates a testament previously made, since he returns into his father's *potestas*. Nor

them *possessio bonorum* of the goods of the actual father. The whole of the regulations as to the claims of adopted children on their actual and adoptive parents were changed by Justinian, whose new system will be found in *Inst.* II. 13. 5; I. 11. 2.

<sup>1</sup> I. 98, 99.

<sup>2</sup> I. 115 b.

<sup>3</sup> If they be already instituted in the testament it must be as *extranei* and not as *sui heredes*. Therefore there is a quasi-agnation all the same, there having been no recognition of them in their present charac-

ter, in fact such recognition having been impossible. "As to disinheriting," Gaius says, "there is no need to make enquiry," for as they were not *sui heredes* at the time the testament was made there was no need to mention them at all. It is the subsequent quasi-agnation which invalidates the testament, not the fact of their being named or not named in it, for if named, they must have been named in another character.

<sup>4</sup> I.

ante factum testamentum. nec prodest si in eo testamento heres institutus vel exheredatus fuerit. (142.) Simile ius olim fuit in eius persona cuius nomine ex senatusconsulto erroris causa probatur, quia forte ex peregrina vel Latina, quae per errorem quasi civis Romana uxor ducta esset, natus esset. nam sive heres institutus esset a parente sive exheredatus, sive vivo patre causa probata sive post mortem eius, omnimodo quasi adgnatione rumpebat testamentum. (143.) Nunc vero ex novo senatusconsulto quod auctore divo Hadriano factum est, si quidem vivo patre causa probatur, aequè ut olim omnimodo rumpit testamentum: si vero post mortem patris, *praeteritus* quidem rumpit testamentum, si vero heres in eo scriptus est vel exheredatus, non rumpit testamentum; ne scilicet diligenter facta testamenta rescinderentur *eo tempore quo* renovari non possent.

144. Posteriore quoque testamento quod iure factum fuerit superius rumpitur. nec interest an extiterit aliquis ex eo heres,

does it matter if he have been instituted heir or disinherited in that testament. 142. There was formerly a like rule in relation to a person with regard to whom a cause of error was proved in accordance with the *senatusconsultum*, because, for instance, he had been born from a foreign or Latin woman, who had been married by mistake, under the impression that she was a Roman citizen<sup>1</sup>. For whether he had been instituted heir by his ascendant or disinherited, and whether cause had been proved during the lifetime of his father or after his death, in all cases he invalidated the testament by his quasi-agnation. 143. But now, according to a new *senatusconsultum* which was made at the instance of the late Emperor Hadrian, if cause be proved in the lifetime of the father, he (the son) invalidates the testament just as formerly: but if it be proved after the death of the father, he invalidates the testament in case he be passed over, but does not invalidate it in case he be appointed heir or disinherited therein: obviously, this is to prevent testaments carefully made from being set aside at a time when they cannot be re-executed.

144. By a testament of later date duly made one of earlier date is invalidated. And it matters not whether any one be-

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<sup>1</sup> L. 67.

*Invalidation by subsequent testament,*

an non extiterit : hoc enim solum spectatur, an existere potuerit. ideoque si quis ex posteriore testamento quod iure factum est, aut noluerit heres esse, aut vivo testatore, aut post mortem eius antequam hereditatem adiret decesserit, aut per *cretionem* exclusus fuerit, aut condicione sub qua heres institutus est defectus sit, aut propter caelibatum ex lege Iulia summotus fuerit ab hereditate : quibus casibus paterfamilias intestatus moritur : nam et prius testamentum non valet, ruptum a posteriore, et posterius aeque nullas vires habet, cum ex eo nemo heres extiterit.

145. Alio quoque modo testamenta iure facta infirmantur, velut *cum* is qui fecerit testamentum capite diminutus sit. quod quibus modis accidat, primo commentario relatum est. (146.) Hoc autem casu *inrita* fieri testamenta dicemus, cum alioquin et quae rumpuntur inrita fiant ; *et quae statim ab initio non iure fiunt inrita sunt ; sed et ea quae iure facta sunt et postea propter*

come heir under the second testament or not : for the only point regarded is whether any one could have become heir. Therefore if any one appointed under the later and duly made testament, either refuse to be heir, or die in the lifetime of the testator, or after his death but before entry on the inheritance, or be excluded by *cretio*<sup>1</sup>, or fail to fulfil some condition under which he was instituted heir, or be debarred from the inheritance by the Lex Julia by reason of celibacy<sup>2</sup> : in all these cases the *paterfamilias* dies intestate, for the earlier testament is void, being invalidated by the later one : and the later one is equally without force, since no one becomes heir under it.

145. Testaments duly made are invalidated in another way, for instance, if the maker of the testament suffer *capitis diminutio*. In what ways this comes to pass has been explained in the first Commentary<sup>3</sup>. 146. But in this case we shall say that the testaments become *ineffectual*, although, on the other hand, those which are invalidated are also ineffectual, and those which are illegally made from the very beginning are ineffectual : and those too which have been duly made,

<sup>1</sup> II. 168.

<sup>2</sup> II. 111. This sentence has no apodosis ; for *quibus* we must read *his* to close it. <sup>3</sup> 1.



*diminutionem irrita fiunt*, possunt nihilominus rupta dici sed quia sane commodius erat singulas causas singulis appellationibus distinguere, ideo quaedam non iure fieri dicuntur, quaedam iure facta rumpi, vel irrita fieri.

147. Non tamen per omnia inutilia sunt ea testamenta, quae vel ab initio non iure facta sunt, vel iure facta postea irrita facta aut rupta sunt. nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et civis Romanus et suae potestatis mortis tempore fuerit: nam si ideo irritum fit testamentum, quod postea civitatem vel etiam libertatem testator amisit, aut is in adoptionem se dedit et mortis tempore in adoptivi patris potestate fuit, non potest scriptus heres secundum tabulas bonorum possessionem petere. (148.) *Qui autem* secundum tabulas testamenti, quae aut statim ab initio non iure factae sint, aut iure factae postea ruptae vel

and afterwards become ineffectual through *capitis diminutio*, might just as well be called invalidated. But as it is plainly more convenient to distinguish particular cases by particular names, therefore some are said to be made illegally, others to be invalidated after being legally made, or to become ineffectual<sup>1</sup>.

147. Those testaments, however, are not altogether valueless which either have been made illegally at the outset, or though made legally, have afterwards become ineffectual or been invalidated. For if testaments be sealed with the seals of seven witnesses, the written heir can claim possession of the goods in accordance with the testament, provided only the deceased testator was a Roman citizen and *sui juris* at the time of his death: for if the testament be ineffectual because the testator subsequently lost citizenship or liberty as well, or because he gave himself in adoption and at the time of his death was in the *potestas* of the adoptive father, then the written heir cannot claim possession of the goods in accordance with the testament. 148. Now those who receive possession of the goods in accordance with a testament, which either was illegally made from the very beginning, or though legally made, afterwards became ineffectual or invalidated, if

<sup>1</sup> See Appendix (E).



inritae erunt, bonorum possessionem accipiunt, si modo possunt hereditatem optinere, habebunt bonorum possessionem cum re : si vero ab iis avocari hereditas potest, habebunt bonorum possessionem sine re. (149.) Nam si quis heres iure civili institutus sit vel ex primo vel ex posteriore testamento, vel ab intestato iure legitimo heres sit, is potest ab iis hereditatem avocare. si vero nemo sit alius iure civili heres, ipsi retinere hereditatem possunt, si possident, aut interdictum adversus eos habent qui bona

only they can obtain the inheritance, will have the possession of the goods with benefit (*cum re*): but if the inheritance can be wrested from them, they will have the possession of the goods without benefit (*sine re*)<sup>1</sup>. 149. For if any one have been instituted heir according to the civil law either in a former or a latter testament, or be heir on intestacy by statute law, he can wrest the inheritance from them<sup>2</sup>. But if there be no other person heir by the civil law, they may retain the inheritance themselves, if they be in possession of it, or they have an interdict for the purpose of acquiring the

<sup>1</sup> It may very well happen that one man is *heres* according to the civil law, and another *bonorum possessor* according to the praetor's edict. For example, suppose a man to have only one son, whom he has emancipated: and also suppose a brother to be his nearest agnate, or suppose him to appoint a testamentary heir: the brother or the written heir is *heres*, but the Praetor will grant *bonorum possessio* to the son: hence the *hereditas* is *sine re*, the *bonorum possessio* is *cum re*. (See § 135). Again the Praetor allowed only a limited time for heirs, whether *scripti* or *ab intestato*, to apply to him for *bonorum possessio* (which it was an advantage to have in addition to *hereditas* because the Interdict Quorum Bonorum (IV. 144) was attached to it), and if they failed to apply within the time, the *bonorum possessio* would be granted to applicants of the class which came next in order of succession, if it were a case of intestacy, or to the heirs *ab intestato* in the case of neglect of application on

the part of a written heir: but still in such a case the heir having merely omitted to secure an additional advantage, and not having forfeited his claim under the civil law, could hold the inheritance against the *bonorum*, and so in this case the *hereditas* was *cum re* and the *bonorum possessio* was *sine re*. See III. 36; Ulpian, XXVIII. 13.

<sup>2</sup> In §§ 148, 149 the two separate cases of a first will or a second will being void at civil law, and *bonorum possessio* nevertheless granted under it, are taken together, and hence a slight confusion. In § 149 the solution of the legal difficulty is given: viz. that if the void will be a second one, the heir under a valid first will has *hereditas cum re*: if the invalid will be the first, it is through the fact of there being a second that it is void, therefore the heir under the second has the *hereditas cum re*: if there be but one will and that void, the *hereditas cum re* goes to the heir on an intestacy.

### Three classes of heirs.

*possident eorum bonorum adipiscendae possessionis causa. interdum tamen, quanquam testamento iure civili institutus, vel legitimus quoque heres sit, potiores scripti habentur, velut si testamentum ideo non iure factum sit aut quod familia non venierit, aut nuncupationis verba testator locutus non sit. (150.) Alia causa est eorum, qui herede non extante bona possederint, nec tamen a Praetore bonorum possessionem acceperint: etiam hi possessores tamen res olim optinebant ante legem Iuliam, qua lege bona caduca fiunt et ad populum deferri iubentur, si defuncto nemo successor extiterit. (151.) — potest, ut iure facta testamenta — — — — — infirmantur apparet posse — — — — — — — — — — testator — — — — — eius — — — — — iure civili valeat qui — — — — — — — — — — tabulas testamenti [2 lin.] quidem — si quis ab intestato bonorum possessionem petierit [3 lin.] perveniat hereditas. et hoc ita rescripto Imperatoris Antonini significantur.*

152. Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.

possession of the goods against those who possess them. Sometimes, however, although there be an heir instituted in (another) testament according to the civil law, or a statutable heir<sup>1</sup>, yet the written heirs are allowed to prevail, for instance, if the point wherein the testament is unduly made be that the *familia* has not been sold, or that the testator has not spoken the words of nuncupation. 150. The case is different with those who hold possession of goods, when no one becomes heir, and yet have not received from the Praetor a grant of the possession<sup>2</sup>: yet even these possessors in olden times, before the Lex Julia, used to obtain the property, but by that law such goods become *caduca*<sup>3</sup> (lapses) and are ordered to be made over to the *populus*, if no one become successor to the dead man. 151. ....

152. Heirs are called either *necessarii*, or *sui et necessarii*, or *extranei*.

<sup>1</sup> That is, an heir *ab intestato*, pointed out by the *jus civile*. The term technically means an heir who is not a *suius*, but an *agnatus*. But

probably there is here no reference to this distinction. Ulp. XXVIII. 7.

<sup>2</sup> II. 52—58.

<sup>3</sup> See Ulpian, XVII. 1. 2; XXVIII. 7.

153. *Necessarius heres est servus cum libertate heres institutus ; ideo sic appellatus, quia, sive velit sive nolit, omnimodo post mortem testatoris protinus liber et heres est. (154.) Unde qui facultates suas suspectas habet, solet servum primo aut secundo vel etiam ulteriore gradu liberum et heredem instituere, ut si creditoribus satis non fiat, potius huius heredis quam ipsius testatoris bona veneant, id est ut ignominia quae accidit ex venditione bonorum hunc potius heredem quam ipsum testatorem contingat ; quamquam aput Fufidium Sabino placeat eximendum eum esse ignominia, quia non suo vitio, sed necessitate iuris bonorum venditionem pateretur : sed alio iure utimur. (155.) Pro hoc tamen incommodo illud ei commodum praestatur, ut ea quae post mortem patroni sibi adquisierit, sive ante bonorum venditionem sive postea, ipsi*

153. A necessary heir is a slave instituted with a grant of liberty : so called from the fact that whether he desire it or not, he is in all cases free and heir at once on the death of the testator. 154. Therefore a man who suspects himself to be insolvent generally appoints a slave free and heir in the first, second, or even some more remote place<sup>1</sup>, so that if the creditors cannot be paid in full, the goods may be sold as those of this heir rather than of himself : that is to say, that the disgrace arising from the sale of the goods may fall upon this heir rather than the testator himself : although Sabinus, according to Fufidius<sup>2</sup>, thinks the slave should be exempted from disgrace, because he suffers the sale not from fault of his own, but from requirement of the law : but we hold to the contrary rule. 155. In return, however, for this disadvantage, there is allowed to him the advantage that whatever he acquires for himself after the death of his patron, whether before the sale of the goods or after, is reserved for himself<sup>3</sup>. And although the goods when sold only pay a part

<sup>1</sup> II. 174.

<sup>2</sup> The phrase "Sabino aput Fufidium" is an ambiguous one. As Fufidius probably lived about A.D. 166, and Sabinus we know was consul in A.D. 69, the translation in our text is justifiable ; but there have been commentators who render it "Sabinus in a commentary on Fufidius," thus

making Fufidius the earlier writer of the two. Passages where *apud* is used in each of these senses are collected in Smith's *Dict. of Roman and Greek Biography and Mythology*, in the article on Ferox, Urseius, q. v.

<sup>3</sup> This is called the *beneficium separationis* by later writers.

### *Heredes sui et necessarii.*

reserventur. et quamvis *pro portione* bona venierint, iterum ex hereditaria causa bona eius non venient, nisi si quid ei ex hereditaria causa fuerit acquisitum, velut si Latinus adquisierit, locupletior factus sit; cum ceterorum hominum quorum bona venierint pro portione, si quid postea adquirant, etiam saepius eorum bona veniri solent.

156. Sui autem et necessarii heredes sunt velut filius filiave, nepos neptisve ex filio, deinceps ceteri, qui modo in potestate morientis fuerunt. sed uti nepos neptisve *suus* heres sit, non sufficit eum in potestate avi mortis tempore fuisse, sed opus est, ut pater quoque eius vivo patre suo desierit *suus* heres esse, aut morte interceptus aut qualibet ratione liberatus potestate: tum enim nepos neptisve in locum sui patris succedunt. (157.) Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et vivo quoque parente quodam modo domini

of the debts (*pro portione venierint*), yet his goods will not be sold a second time on account of the inheritance, unless he has acquired something in connexion with the inheritance; for instance<sup>1</sup>, if he be a Latin and have been enriched through acquisitions he has made<sup>2</sup>: although when the goods of other men will only pay in part, if they acquire anything afterwards, their goods are sold over and over again.

156. Heirs *sui et necessarii* are such as a son or daughter, a grandson or granddaughter by a son, and others in direct descent, provided only they were in the *potestas* of the dying man. But in order that a grandson or granddaughter may be *suus heres*, it is not enough for them to have been in the *potestas* of the grandfather at the time of his death, but it is needful that their father should also have ceased to be *suus heres* in the lifetime of his father, having been either cut off by death or freed from *potestas* in some way or other: for then the grandson or granddaughter succeeds into the place of the father. 157. They are called *sui heredes* because they are heirs of the house, and even in the lifetime of their ascendant are regarded as owners (of the property) to a certain

<sup>1</sup> The word *si* should be repeated: *pletior factus sit*. So also in II. *velut si, si Latinus adquisierit, locu-*

<sup>2</sup> III. 56.

existimantur. unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii vero ideo dicuntur, quia omnimodo, *sive* velint *sive* nolint, *tam* ab intestato quam ex testamento heredes fiunt. (158.) sed his Praetor permittit abstinere se ab hereditate, ut potius parentis bona veneant. (159.) Idem iuris est et *in* uxoris persona quae in manu est, quia filiae loco est, et in nurus quae in manu filii est, quia neptis loco est. (160.) Quin etiam similiter abstinendi potestatem facit Praetor etiam [mancipato, id est] ei qui in causa mancipii est, cum liber et heres institutus sit; cum necessarius, non etiam suus heres sit, tamquam servus.

161. Ceteri qui testatoris iuri subiecti non sunt extranei heredes appellantur. itaque liberi quoque nostri qui in potes-

extent<sup>1</sup>. Wherefore, if any one die intestate, the first place in the succession belongs to his descendants. But they are called *necessarii*, because in every case, whether they wish or not, and whether on intestacy or under a testament, they become heirs. 158. But the Praetor permits them to abstain from the inheritance, in order that the goods sold may be their ascendant's (rather than their own<sup>2</sup>). 159. The rule is the same as to a wife who is in *manus*, because she is in the place of a daughter, and as to a daughter-in-law who is in the *manus* of a son, because she is in the place of a granddaughter. 160. Besides, the Praetor grants in like manner a power of abstaining to (a mancipated son, that is to) one who is in *causa mancipii*, when he is instituted free and heir: since like a slave he is a *heres necessarius*, not *suius* also<sup>3</sup>.

161. All others who are not subject to a testator's authority are called extraneous heirs. Thus, our descendants not in our

<sup>1</sup> Papinian, D. 38. 6. 7, gives another derivation: "suius heres erit cum et ipse fuerit in potestate:" i. e. the ascendant had him in his *potestas* and so he was *suius* "belonging to him:" just as land or a chattel was also *suum*, because he had *dominium* over it.

<sup>2</sup> They could not get rid of the appellation of heirs, but they could get rid of all the practical conse-

quences of heirship by this *beneficium abstinendi*; and so the disgrace of the sale (§ 154) fell on the memory of the deceased and not on themselves.

<sup>3</sup> I. 138. "*Suius* also," i. e. *necessarius et suus*.

This clause explains why a mancipated person should be appointed *frater* and heir. A person in *causa mancipii* is technically a slave. I. 123.

tate nostra non sunt, heredes a nobis instituti sicut extranei videntur. qua de causa et qui a matre heredes instituuntur eodem numero sunt, quia feminae liberos in potestate non habent. servi quoque qui cum libertate heredes instituti sunt et postea a domino manumissi, eodem numero habentur.

162. Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate vel non adeunda. (163.) Sed sive is cui abstinendi potestas est inmiscuerit se bonis hereditariis, sive is cui de adeunda hereditate deliberare licet, adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum xxv. nam huius aetatis hominibus, sicut in ceteris omnibus causis, deceptis, ita etiam si temere damnosam hereditatem susceperint, Praetor succurrit. scio quidem divum Hadrianum etiam maiori xxv annorum veniam dedisse, cum post aditam hereditatem grande aes alienum quod aditae hereditatis tempore latebat apparuisset.

when appointed heirs by us, are regarded as extraneous. Wherefore, those who are appointed by a mother are in the same class, because women have not their children in their *potestas*. Slaves also who have been instituted heirs with a grant of liberty, if afterwards manumitted by their master, are in the same class<sup>1</sup>.

162. To extraneous heirs is allowed a power of deliberating as to entering on the inheritance or not. 163. But if one who has the power of abstaining<sup>2</sup> meddle with the goods of the inheritance, or if one who is allowed to deliberate<sup>3</sup> as to entering on the inheritance enter, he has not afterwards the power of abandoning the inheritance, unless he be under twenty-five years of age. For, as the Praetor gives assistance in all other cases to men of this age who have been deceived, so he does also if they have thoughtlessly taken upon themselves a ruinous inheritance. I am aware, however, that the late emperor Hadrian granted this favour also to one above twenty-five years of age, when after entry on the inheritance a great debt was discovered which was unknown at the time of entry.

<sup>1</sup> II. 188.

<sup>2</sup> Sc. a *heres suus et necessarius*. I. 158.

<sup>3</sup> Sc. a *heres extraneus*. I. 162.

164. Extraneis heredibus solet *cretio* dari, id est finis deliberandi, ut intra certum tempus vel adeant hereditatem, vel si non adeant, temporis fine summoveantur. ideo autem *cretio* appellata est, quia cernere est quasi decernere et constituere. (165.) Cum ergo ita scriptum sit: HERES TITIUS ESTO: adicere debemus; CERNITOQUE IN CENTUM DIEBUS PROXUMIS QUIBUS SCIES POTERISQUE. QUOD NI ITA CREVERIS, EXHERES ESTO. (166.) Et qui ita heres institutus est si velit heres esse, debet intra diem *cretionis* cernere, id est haec verba dicere: QUOD ME PUBLIUS MAEVIUS TESTAMENTO SUO HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE. Quodsi ita non creverit, finito tempore *cretionis* excluditur: nec quicquam proficit, si pro herede gerat, id est si rebus hereditariis tamquam heres utatur. (167.) At is qui sine *cretione* heres institutus sit, aut

164. To extraneous heirs *cretio* is usually given, that is, a period in which to deliberate; so that within some specified time they are either to enter on the inheritance, or if they do not enter, are to be set aside at the expiration of the time. It is called *cretio* because the verb *cernere* means to deliberate, as it were, and decide<sup>1</sup>. 165. When, therefore, the clause has been written, "Titius be heir," we ought to add, "and make thy *cretio* within the next hundred days after thou hast knowledge and ability. But if thou dost not thus make *cretio*, be disinherited." 166. And if the heir thus instituted desire to be heir, he ought to make *cretion* within the time allowed for *cretion*, *i.e.* speak the words, "Inasmuch as Publius Maevius has instituted me heir in his testament, I enter on that inheritance and make *cretion* for it." But if he do not thus make *cretion*, he is debarred at the expiration of the time limited for *cretion*. Nor is it of any avail for him to act as heir, *i.e.* to use the items of the inheritance as though he were heir<sup>2</sup>. 167. But an heir appointed without *cretion*,

<sup>1</sup> Ulpian. XXII. 23--34. "Crevi valet constitui: itaque heres quum constituit se heredem esse, dicitur cernere, et quum id facit, crevisse" Varro, *de L. L.* VII. 98. See also Festus, sub verbo.

<sup>2</sup> "Pro herede gerere est destinatione futuri domini aliquid ex

ditariis rebus usurpari. Et ideo pro herede gerere videtur qui fundorum hereditarium culturas rationesque disponit. Et qui servis hereditariis, jumentis rebusve aliis utitur." Paulus, *S. R.* IV. 8. § 23. See also Just. *Inst.* II. 19. 7.



qui ab intestato legitimo iure ad hereditatem vocatur, potest aut cernendo aut pro herede gerendo vel etiam nuda voluntate suscipiendae hereditatis heres fieri: eique liberum est, quocumque tempore voluerit, adire hereditatem. *sed* solet Praetor postulantibus hereditariis creditoribus tempus constituere, intra quod si velit adeat hereditatem: si minus, ut liceat creditoribus bona defuncti vendere. (168.) Sicut autem cum cretione heres institutus, nisi creverit hereditatem, non fit heres, ita non aliter excluditur, quam si non creverit intra id tempus quo cretio finita sit. itaque licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus superante die cretionis cernendo heres esse potest. (169.) At hic qui sine cretione heres institutus est, quique ab intestato per legem vocatur, sicut voluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur. (170.) Omnis autem cretio certo tempore constringitur. in quam rem tolerabile tempus visum est centum dierum: potest tamen nihilo-

or one called to the inheritance by statute law on an intestacy, can become heir either by exercising cretion, or by acting as heir, or even by the bare wish to take up the inheritance: and it is in his power to enter on the inheritance whenever he pleases. But the Praetor usually fixes a time, on the demand of the creditors of the inheritance, within which he may enter on the inheritance if he please, but if he do not enter, then the creditors are allowed to sell the goods of the deceased. 168. In like manner as any one instituted heir with cretion does not become heir unless he make cretion for the inheritance, so he is not debarred in any other manner than if he do not make cretion within the time at which the cretion is limited. Therefore, although before the day limiting the cretion he may have decided not to enter on the inheritance, yet on repenting of his act he may become heir by using his cretion, if a portion of the time of cretion still remain. 169. But one who is instituted heir without cretion, or who is called in by law on an intestacy, as on the one hand he becomes heir by bare wish, so on the other, by an opposite determination he is at once excluded from the inheritance. 170. Now every cretion is tied down to some fixed time. For which object a hundred days seems a fair allowance: but



minus iure civili aut longius aut brevius tempus dari: longius tamen interdum Praetor coartat. (171.) Et quamvis omnis cretio certis diebus constringatur, tamen alia cretio vulgaris vocatur, alia certorum dierum: vulgaris illa, quam supra exposuimus, id est in qua *adiciuntur* haec verba: QUIBUS SCIET POTERITQUE; certorum dierum, in qua detractis his verbis cetera scribuntur. (172.) Quorum cretionum magna differentia est. nam vulgari cretione data nulli dies computantur, nisi quibus scierit quisque se heredem esse institutum et possit cernere. certorum vero dierum cretione data etiam nescienti se heredem institutum esse numerantur dies continui; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius ei qui sub condicione heres institutus est, tempus numeratur. unde melius et aptius est vulgari cretione uti. (173.) Continua haec cretio vocatur, quia continui dies numerantur. sed quia

nevertheless, at civil law, either a longer or a shorter time can be given, though the Praetor sometimes abridges a longer time. 171. And although every cretion is tied down to some fixed number of days, yet one kind of cretion is called common (*vulgaris*), the other cretion of fixed days (*certorum dierum*): the common is that which we have explained above<sup>1</sup>, *i.e.* that in which are added the words, "after he has knowledge and ability:" that of fixed days is the cretion in which the rest of the form is written, and these words omitted. 172. Between these cretions there is a great difference: for when common cretion is appointed, no days are taken into account, except those whereon the man knows that he is instituted heir, and is able to make his cretion. But when cretion of fixed days is appointed, the days are reckoned continuously, even against one who does not know that he has been instituted heir; likewise the time is counted against one who is prevented by any reason from making his cretion, and further than this, against one who is instituted heir under a condition. Therefore it is better and more convenient to employ common cretion. 173. This cretion is called "continuous," because the days are reckoned continuously. But since this cretion is too strict,

### *Substitution.*

tamen dura est haec cretio, altera in usu habetur : unde etiam vulgaris dicta est.

#### DE SUBSTITUTIONIBUS.

(174.) Interdum duos pluresve gradus heredum facimus, hoc modo : LUCIUS TITIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM PROXIMIS QUIBUS SCIES POTERISQUE. QUOD NI ITA CREVERIS, EXHERES ESTO. TUM MAEVIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM et reliqua ; et deinceps in quantum velimus substituere possumus. (175.) Et licet nobis vel unum in unius locum substituere pluresve, et contra in plurium locum vel unum vel plures substituere. (176.) Primo itaque gradu scriptus heres hereditatem cernendo fit heres et substitutus excluditur ; non cernendo summovetur, etiam si pro herede gerat, et in locum eius substitutus succedit. et deinceps si plures gradus sint, in singulis simili ratione idem contingit. (177.) Sed si cretio sine exheredatione sit data, id est *in* haec verba : SI NON CREVERIS TUM PUBLIUS MAEVIUS HERES ESTO, illud diversum invenitur, quia si prior omitta cretione pro herede gerat, substitutus in partem

the other is generally employed, and therefore it is called "common."

174. Sometimes we make two or more degrees of heirs, in this manner : "Lucius Titius be heir, and make thy cretion within the next hundred days after thou hast knowledge and ability. But if thou dost not so make cretion, be disinherited. Then Maevius be heir, and make thy cretion within a hundred days," &c. And so we can substitute successively as far as we wish. 175. And it is in our power to substitute either one person or several in the place of one ; and on the other hand, either one or several in the place of several. 176. The heir, then, instituted in the first degree, by making cretion for the inheritance becomes heir, and the substitute is excluded : but by not making cretion he is excluded, even though he act as heir, and the substitute succeeds into his place. And so, if there be several degrees, the same thing happens to each successively in like manner. 177. But if cretion be given without disinheritance, *i.e.* in the words, "If thou dost not exercise cretion, then let Publius Maevius be heir;" this difference is discovered, that if the heir first named, neglecting his cretion, act as heir, the substitute is admitted

admittitur, et fiunt ambo aequis partibus heredes. *quod si neque cernat neque pro herede gerat, sane in universum summovetur, et substitutus in totam hereditatem succedit.* (178:) Sed *dudum* quidem placuit, quamdiu cernere et eo modo heres fieri possit prior, etiam si pro herede gesserit, non tamen admitti substitutum: cum vero *cretio* finita sit, tum pro herede *gerentem* *admittere substitutum*: *olim* vero placuit, etiam superante *cretione* posse eum pro herede gerendo in partem substitutum *admittere* et amplius ad *cretionem* reverti non posse.

179. Liberis nostris inpueribus quos in potestate habemus non solum ita, ut supra diximus, substituere possumus, id est ut *si* heredes non extiterint, alius nobis heres sit; sed eo amplius, ut etiam si heredes nobis extiterint et adhuc inpueres mortui fuerint, sit iis aliquis heres, velut hoc modo: TITUS

to a portion, and both become heirs to equal shares<sup>1</sup>. But if he neither make *cretion* nor act as heir, he is undoubtedly debarred altogether, and the substitute succeeds to the entire inheritance. 178. But it has now for some time been the rule, that so long as the first-named heir can exercise *cretion* and so become heir, even if he act as heir, yet the substitute is not admitted: but that, when the time for *cretion* has elapsed, then by acting as heir he lets in the substitute: whilst in olden times it was the rule, that even if the time for *cretion* were unexpired, yet by acting as heir he let in the substitute to a portion, and could not afterwards fall back upon his *cretion*.

179. We can substitute to our descendants under the age of puberty whom we have in our *potestas*, not only in the way we have described above, *i.e.* that if they do not become our heirs, some one else may be *our* heir: but further than this, so that even if they do become our heirs, and die whilst still under puberty, some one else shall be *their* heir<sup>2</sup>; for example,

Ulpian (xxii. 34) calls this *imperfecta creatio*. He also mentions a constitution by which *gestio pro herede* was made equivalent to *cretio*, and gave the whole inheritance to the heir first named. So that either Gaius has here made a slip, or the decree came out after this portion of

the commentary was written. The comparison of § 178 with this paragraph would point to the latter conclusion.

<sup>2</sup> Ulpian, xxiii. 7—9. In the last of these paragraphs it is laid down much more plainly than by Gaius (though he too implies the fact

*substitution.*

FILIUS MEUS MIHI HERES ESTO. SI FILIUS MEUS MIHI  
NON ERIT SIVE HERES ERIT ET PRIUS MORIATUR QUAM IN SUAM  
TUTELAM VENERIT, SEIUS HERES ESTO. (180.) Quo casu si qui-  
dem non extiterit heres filius, substitutus patri fit heres: *si vero*  
heres extiterit filius et ante pubertatem decesserit, ipsi filio fit  
heres substitutus. quamobrem duo quodammodo sunt testa-  
menta: aliud patris, aliud filii, tamquam si ipse filius sibi here-  
dem instituisset; aut certe unum est testamentum duarum here-  
ditatum.

181. Ceterum ne post obitum parentis periculo insidiarum  
subiectus videatur pupillus, in usu est vulgarem quidem sub-  
stitutionem palam facere, id est eo loco quo pupillum heredem  
instituimus: *nam* vulgaris substitutio ita vocat ad hereditatem  
substitutum, si omnino pupillus heres non extiterit; quod  
accidit cum vivo parente moritur, quo casu nullum substituti  
maleficio suspicari possumus, cum scilicet vivo testatore  
omnia quae in testamento scripta sint ignorentur. illam autem

thus: "Titius, my son, be my heir. If my son shall not be-  
come my heir, or if he become my heir and die before he  
comes into his own governance, Seius be heir." 180. In  
which case, if the son do not become heir, the substitute be-  
comes heir to the father: but if the son become heir and die  
before puberty, the substitute becomes heir to the son him-  
self. Wherefore there are, in a manner, two testaments: one  
of the father, another of the son, as though the son had  
instituted an heir for himself: or at any rate there is one  
testament regarding two inheritances.

181. But lest there be a likelihood of the pupil being  
exposed to foul play after the death of his ascendant, it is  
usual to make the vulgar substitution openly, *i.e.* in the place  
where we institute the pupil heir: for the vulgar substitution  
calls the substitute to the inheritance in case the pupil do  
not become heir at all: which occurs when he dies in his  
ascendant's lifetime, a case wherein we can suspect no evil  
act on the part of the substitute, since plainly whilst the tes-  
tator lives, all that is written in his testament is unknown:

throughout) that the testament for a testament of the ascendant, and  
the pupil must be an appendage to cannot exist otherwise.

substitutionem per quam, etiamsi heres extiterit pupillus et intra pubertatem decesserit, substitutum vocamus, separatim in inferioribus tabulis scribimus, easque tabulas proprio lino propriaque cera consignamus; et in prioribus tabulis cavemus, ne inferiores tabulae vivo filio et adhuc inpubere aperiantur. *Sed* longe tutius est utrumque genus substitutionis separatim in inferioribus tabulis consignari, quod si ita consignatae vel separatae fuerint substitutiones, ut diximus, ex priore potest intellegi in altera [alter] quoque idem esse substitutus.

182. Non solum autem heredibus institutis inpuberibus liberis ita substituere possumus, ut si ante pubertatem mortui fuerint, sit is heres quem nos voluerimus, sed etiam exheredatis. itaque eo casu si quid pupillo ex hereditatibus legatisve aut donationibus propinquorum acquisitum fuerit, id omne ad substitutum pertinet. (183.) Quaecumque diximus de substitutione inpuberum liberorum, vel heredum institutorum vel exheredatorum, eadem etiam de postumis intelligemus.

184. Extraneo vero heredi instituto ita substituere non

but the substitution whereby we call in the substitute if the pupil become heir and die under the age of puberty, we write separately in the concluding tablets, and seal up these tablets with a string and seal of their own: and we insert a proviso in the earlier tablets, that the concluding tablets are not to be opened whilst the son is alive and under puberty. But it is by far the safer method to seal up both kinds of substitution in the concluding tablets, because if the substitutions have been sealed up or separated in the manner we have (above) described, it can easily be guessed from the first that the substitute is the same in the second.

182. We can not only substitute to descendants under puberty who are instituted heirs, in such manner that if they die under puberty, he whom we choose shall be heir, but we can also substitute to disinherited children. In that case, therefore, if anything be acquired by the pupil from inheritances, legacies or gifts of relations, the whole of it belongs to the substitute. 183. All that we have said as to the substitution of descendants under puberty, whether instituted heirs or disinherited, we shall also understand to apply to posthumous children.

184. But if a stranger be instituted heir, we cannot substitute

possumus, ut si heres extiterit et intra aliquod tempus decesserit, alius ei heres sit: sed hoc solum nobis permissum est, ut eum per fideicommissum obligemus, ut hereditatem nostram vel totam vel *pro* parte restituat; quod ius quale sit, suo loco trademus.

185. Sicut autem liberi homines, ita et servi, tam nostri quam alieni, heredes scribi possunt. (186.) *Sed* noster servus simul et liber et heres esse iuberi debet, id est hoc modo: STIC/HUS SERVUS MEUS LIBER HERESQUE ESTO, vel HERES LIBERQUE ESTO. (187.) Nam si sine libertate heres institutus sit, etiam si postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona eius non constitit; ideoque licet alienatus sit, non potest iussu domini cernere hereditatem.

188. Cum libertate vero heres institutus, si *quidem in eadem manserit*, fit ex testamento liber *idemque* necessarius heres.

to him in such manner, that if he become heir and die within some specified time, some other person is to be heir to him: but this alone is permitted us, that we may bind him by *fideicommissum*<sup>1</sup> to deliver over our inheritance either wholly or in part: the nature of which rule we will explain in its proper place.

185. Slaves, whether our own or belonging to other people, can be appointed heirs, just as well as free men<sup>2</sup>. 186. But it is necessary to appoint our own slave at once free and heir, *i.e.* in this manner: "Let Stichus, my slave, be free and heir," or "be heir and free." 187. For if he be instituted heir without a gift of liberty, even though he be afterwards manumitted by his master, he cannot be heir, because the institution was invalid in his then status<sup>3</sup>; and therefore, even if he be alienated, he cannot make cretion for the inheritance at the order of his master<sup>4</sup>.

188. When, however, he is instituted with a gift of freedom, if he remain in the same condition, he becomes by virtue of the testament free, and at the same time necessary heir<sup>5</sup>. But if he

<sup>1</sup> II. 246 et seqq.; II. 277.

<sup>2</sup> Ulpian, XXII. 7—13.

<sup>3</sup> Justinian altered the law on this point, so that thenceforward the ap-

pointment of a slave as heir gave him liberty by implication. *Inst.* II. 14. pr.

<sup>4</sup> II. 164.

<sup>5</sup> II. 153.

si vero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. quodsi alienatus sit, iussu novi domini *adire hereditatem debet, et ea* ratione per eum dominus fit heres: *nam ipse alienatus neque* heres neque liber esse potest. (189.) Alienus quoque servus heres institutus, *si in* eadem causa duraverit, iussu domini hereditatem adire debet; si vero alienatus fuerit *ab eo, aut vivo* testatore aut post mortem eius *antequam* adeat, debet iussu novi domini cernere. si *manumissus est* *antequam* adeat, suo arbitrio adire hereditatem potest. (190.) Si autem servus alienus heres institutus *est* vulgari cretione data, ita intelligitur dies cretionis *cedere, si* ipse servus scierit se heredem institutum esse, nec ullum impedimentum sit, quominus certiores dominum faceret, ut illius iussu cernere possit.

191. Post haec videamus de legatis. Quae pars iuris extra

be manumitted by the testator, he can enter on the inheritance at his own pleasure. If again he have been alienated, he must enter on the inheritance at the command of his new master, and so by his means the master becomes heir: for when alienated he cannot himself become either heir or free<sup>1</sup>. 189. When another man's slave is instituted heir, if he remain in the same condition, he must enter on the inheritance by command of his master: but if he be alienated by him, either in the testator's lifetime or after his death, and before he has entered, he must make cretion by order of his new master. If he be manumitted before he enters, he can enter on the inheritance at his own pleasure. 190. Further, if another man's slave be instituted heir, and common cretion<sup>2</sup> appointed, the time of cretion only begins to run, if the slave know that he is instituted heir, and there is no hindrance to his informing his master, so that he may make cretion at his command.

191. Next, let us consider as to legacies<sup>3</sup>. Which portion

<sup>1</sup> The due appointment of an heir is the foundation of the whole testament (II. 116): if the appointment be invalid the testament fails utterly; but if a legacy fail the residue of the testament stands good. The appointment of the slave as heir, in the present case, is valid, but for juridical reasons he inherits for the benefit of

another: the gift of liberty is regarded as a legacy, and therefore the impossibility of its being received, is, by the above principle, a matter of minor importance, not at any rate causing the inheritance to fail.

<sup>2</sup> II. 173.

<sup>3</sup> "Legatum est quod legis modo, id est imperative, testamento relin-



### *Legacies: their kinds.*

propositam quidem materiam videtur; nam loquimur de his iuris figuris quibus per universitatem res nobis adquiruntur. sed cum omnimodo de testamentis deque heredibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco poterat haec iuris materia tractari.

192. Legatorum utique genera *sunt* quattuor: aut enim per vindicationem legamus, aut per damnationem, aut sinendi modo, aut per praeceptionem.

193. Per vindicationem *hoc modo legamus*: LUCIO TITIO verbi gratia HOMINEM STICHUM DO LEGO. sed *et si alterutrum verbum positum sit, velut: hominem stichum do, per vindicationem legatum est. si vero etiam aliis verbis velut ita legatum fuerit: sumito, vel ita: sibi habeto, vel ita: CAPITO, aequè per vindicationem legatum est.* (194.) *Ideo autem per vindicationem legatum appellatur, quia post aditam hereditatem statim ex iure*

of law seems indeed beyond the subject we proposed to ourselves<sup>1</sup>: for we are speaking of those legal methods whereby things are acquired for us in the aggregate: but as we have discussed all points relating to testaments and heirs who are appointed in testaments, this matter of law may with good reason be discussed in the next place.

192. There are then four kinds of legacies<sup>2</sup>: for we either give them by *vindicatio*, by *damnatio*, *sinendi modo*, or by

193. We give a legacy by vindication in the following manner: "I give and bequeath the man Stichus," for example, "to Lucius Titius." Also if only one of the two words be used, for instance, "I give the man Stichus," still it is a legacy by vindication. And even if the legacy be given in other words, for instance thus, "let him take," or thus, "let him have for himself," or thus, "let him acquire," it is still a legacy by vindication. 194. The legacy "by vindication" is so called because after the inheritance is entered upon, the thing at once becomes the property of the legatee *ex jure Quiritium*;

quitur. Nam ea quae precativo defuncto relicta [ab herede praestando relinquantur fideicommissa da]. *Inst.* II. 20. 1.  
vocantur." Ulpian, XXIV. 1. <sup>1</sup> II. 97.

"Legatum est donatio quaedam a <sup>2</sup> Ulpian, XXIV. 2—14.



Quiritium res legatarii fit; et si eam rem legatarius vel ab herede vel ab alio quocumque qui eam possidet petat, vindicare debet, id est intendere *eam rem suam* ex iure Quiritium esse. (195.) In eo vero dissentiunt prudentes, quod Sabinus quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatarii, etiamsi ignoret sibi legatum esse dimissum, et postea quam scierit et *repudiaverit*, tum perinde esse atque si legatum non esset: Nerva vero et Proculus ceterique illius scholae auctores non aliter putant rem legatarii fieri, quam si voluerit eam ad se pertinere. Sed hodie ex divi Pii Antonini constitutione hoc magis iure uti videmur quod Proculo placuit. nam cum legatus fuisset Latinus *per vindicationem* coloniae: deliberent, inquit, decuriones an ad se velint pertinere, proinde ac si uni legatus esset. (196.) *Eae* autem solae res *per vindicationem* legantur recte quae ex iure Quiritium ipsius testatoris sunt. sed eas quidem

and if the legatee demand the thing either from the heir or from any other person who is in possession of it, he must proceed by *vindicatio*<sup>1</sup>, i.e. plead that the thing is his *ex jure Quiritium*. 195. As to the following point, however, the law authorities differ, in that Sabinus and Cassius and the rest of our authorities think that what is left as a legacy in this way becomes the property of the legatee at the moment when the inheritance is entered on, even if the legatee be ignorant that the legacy has been left to him; and that after he has become aware of it and refused it, it is then as though it had not been bequeathed: whilst Nerva and Proculus and the other authorities of that school think that the thing does not become the legatee's, unless he have the intent that it shall belong to him. But at the present day, in accordance with a constitution of the late emperor Pius Antoninus, we seem rather to follow the rule of Proculus: for when a Latin had been left as a legacy by vindication to a colony: "let the *decuriones*," he said, "consider whether they wish him to belong to them, in the same manner as if he had been bequeathed to an individual." 196. Those things alone can be bequeathed effectually by vindication which belong to the testator himself *ex jure Quiritium*. But it has been ruled as to those things

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<sup>1</sup> IV. 1—5.

<sup>2</sup> See Appendix (F).

*res* quae pondere, numero, mensura constant, placuit sufficere si mortis tempore sint ex iure Quiritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. ceteras res vero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo faceret testamentum et quo moreretur: alioquin inutile est legatum. (197.) Sed sane hoc ita est iure civili. Postea vero auctore Nerone Caesare senatusconsultum factum est, quo cautum est, ut si eam rem quisque legaverit quae eius numquam fuerit, perinde utile sit legatum, atque si optimo iure relictum esset. optimum autem ius est per damnationem legatum; quo genere etiam aliena res legari potest, sicut inferius apparebit. (198.) Sed si quis rem suam legaverit, deinde post testamentum factum eam alienaverit, plerique putant non solum iure civili inutile esse legatum, sed nec ex senatusconsulto confirmari. quod ideo dictum est, quia etsi per damnationem ali-

which depend on weight, number, or measure, that it is sufficient if they be the testator's *ex jure Quiritium* at the time of his death; for instance, wine, oil, corn, coin. Whilst it has been ruled that other things ought to be the testator's *ex jure Quiritium* at both times, that is to say, both at the time he made the testament and at the time he died; otherwise the legacy is invalid. 197. This is so undoubtedly by the civil law. But, afterwards, at the instance of Nero Caesar, a *senatusconsultum* was enacted, wherein it was provided that if a man bequeathed a thing which had never been his, the legacy should be as valid as if it had been bequeathed in the most advantageous form<sup>1</sup>. Now the most advantageous form is a legacy by damnation: by which kind even the property of another can be bequeathed, as will appear below<sup>2</sup>. 198. But if a man bequeath a thing of his own, and then after the making of his testament, alienate it, it is the general opinion that the legacy is not only invalid at the civil law, but that it is not even upheld by the *senatusconsultum*. The reason of this being so laid down is that it is generally held

<sup>1</sup> Nero's S.C. enacted that when a legacy was invalid on account of improper words being used, and there was no other objection to be taken to it, the legacy should be upheld:

"ut quod minus pactis (aptis?) verbis legatum est, perinde sit ac si optimo jure legatum esset." Ulpian, XXIV. 11 a.  
<sup>2</sup> II. 202.

quis rem suam legaverit eamque postea alienaverit, plerique putant, licet ipso iure debeatur legatum, tamen legatarium petentem per exceptionem doli mali repelli quasi contra voluntatem defuncti petat. (199.) Illud constat, si duobus pluribusve per vindicationem eadem res legata sit, sive coniunctim sive disiunctim, si omnes veniant ad legatum, partes ad singulos pertinere, et deficientis portionem collegatario adcrecere. coniunctim autem ita legatur: TITIO ET SEIO HOMINEM STICHUM DO LEGO; disiunctim ita: LUCIO TITIO HOMINEM STICHUM DO LEGO. SEIO EUNDEM HOMINEM DO LEGO. (200.) Illud quaeritur, quod sub condicione per vindicationem legatum est, pendente condicione cuius esset. Nostri praeceptores heredis esse putant exemplo statuliberi, id est eius servi qui testamento sub aliqua condicione liber esse iussus est, quem constat interea heredis servum esse. sed diversae scholae auctores putant nullius interim eam rem esse; quod multo magis dicunt de eo

that even if a man bequeath his property by damnation and afterwards alienate it, although by the letter of the law the legacy is due, yet the legatee on demanding it will be defeated by an *exceptio doli mali*<sup>1</sup>, because he makes demand contrary to the will of the deceased. 199. It is an acknowledged rule that if the same thing be left to two or more persons by vindication, whether conjointly or disjointly, and if all accept the legacy, equal portions go to each, and the portion of one not taking accrues to his co-legatee. Now a legacy is left conjointly thus: "I give and bequeath the man Stichus to Titius and Seius;" disjointly, thus: "I give and bequeath to Lucius Titius the man Stichus. I give and bequeath to Seius the same man." 200. This question arises, whose is a legacy left by vindication under a condition, whilst the condition is unfulfilled? Our authorities think it belongs to the heir, after the precedent of the *statuliber*<sup>2</sup>, i. e. the slave who is in a testament ordered to become free under some condition, and who, it is admitted, is the slave of the heir for the meantime. But the authorities of the other school think that the thing belongs to no one in the interim: and they assert this still

<sup>1</sup> IV. 115 et seqq.

<sup>2</sup> Ulpian, II. 1, 2.

*Per damnationem.*

quod sine condicione pure legatum est, antequam legatarius admittat legatum.

201. Per damnationem hoc modo legamus: HERES MEUS STICHUM SERVUM MEUM DARE DAMNAS ESTO. sed et si DATO scriptum sit, per damnationem legatum est. (202.) Quo genere legati etiam aliena res legari potest, ita ut heres redimere et praestare aut aestimationem eius dare debeat. (203.) Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, velut fructus qui in illo fundo nati erunt, aut quod ex illa ancilla natum erit. (204.) Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per vindicationem legatum continuo legatario acquiritur, sed nihilominus heredis est. ideo legatarius in personam agere debet, id est intendere heredem sibi dare oportere: et tum heres *rem*, si Mancipi sit, Mancipio dare aut in iure cedere possessionemque tradere debet; si nec Mancipi sit, sufficit si tradiderit. nam si Mancipi rem tantam tradiderit,

more strongly as to a thing left simply without condition, before the legatee accepts the legacy.

201. We bequeath by damnation in the following manner: "Let my heir be bound to give Stichus my slave:" and it is also a legacy by damnation if the wording be "let him give." 202. By which kind of legacy even a thing belonging to another may be bequeathed, so that the heir has to purchase and deliver it or give its value. 203. By damnation also can be bequeathed a thing which is not in existence, if only it will come into existence, as for instance, the fruits which shall spring up in a certain field, or the offspring which shall be born from a certain female slave. 204. A thing thus bequeathed does not at once vest in the legatee after the inheritance is entered upon, like a legacy by vindication, even though it be bequeathed unconditionally, but still belongs to the heir. Therefore the legatee must bring a personal action, i.e. plead that the heir is bound to give him the thing<sup>1</sup>: and then, if it be a *res Mancipi*, the heir must give it by *Mancipium*<sup>2</sup>, or make *cessio in jure*<sup>3</sup> of it, and deliver up the possession: if it be a *res nec Mancipi*, it is enough that he deliver it. For if he merely deliver a *res Mancipi*, without

<sup>1</sup> IV. 2.

<sup>2</sup> I. 119.

<sup>3</sup> II. 24.

*Per damnationem. Caduca.*

nec mancipaverit, usucapione *dumtaxat* pleno iure fit legatarii : *finitur* autem *usucapio*, *ut supra quoque* diximus, mobilium quidem rerum anno, earum vero quae solo tenentur, biennio. (205.) Est et *alia differentia inter legatum per vindicationem et per damnationem* : *si enim eadem res* duobus pluribusve per *damnationem* legata sit, si quidem coniunctim, plane singulis partes debentur *sicut in per vindicationem legato*. *si vero* disiunctim, singulis solida res *debetur*, ut scilicet heres alteri rem, alteri aestimationem eius praestare debeat. et in coniunctis deficientis portio non ad collegatarium pertinet, sed in hereditate remanet.

206. Quod autem diximus deficientis portionem *in* per *damnationem* quidem legato in hereditate retineri, in per *vindicationem* vero collegatario accrescere, admonendi sumus ante legem Papiam iure civili ita fuisse : post legem vero Papiam deficientis portio *caduca* fit et ad eos pertinet qui in eo testamento liberos habent. (207.) Et quamvis prima causa sit in

mancipating it, it only becomes the legatee's in full title by usucapion : and usucapion, as we have also said above<sup>1</sup>, is completed in the case of moveable things in one year, but in the case of those connected with the soil in two. 205. There is also another difference between a legacy by vindication and one by damnation : for supposing the same thing be bequeathed to two or more persons by damnation, if it be conjointly, clearly equal portions are due to each as in a legacy by vindication : but if disjointly, the whole thing is due to each, so that in fact the heir must give up the thing to one and its value to the other. Also, in conjoint legacies, the portion of one who fails to take does not belong to his co-legatee, but remains in the inheritance.

206. But as to our statement that the portion of one failing to take is retained in the inheritance in the case of a legacy by damnation, but accrues to the co-legatee in the case of one by vindication : we must be reminded that it was so by the civil law before the Lex Papia : but that now, when the Lex Papia<sup>2</sup> has been passed, the portion of one failing becomes a lapse, and belongs to those persons named in the testament who have children. 207. And although in claiming lapses, the first

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<sup>1</sup> II. 41.

<sup>2</sup> A.D. 10. See note (G) in Appendix.

caducis vindicandis heredum liberos habentium, deinde, si heredes liberos non habeant, legatariorum liberos habentium, tamen ipsa lege Papia significatur, ut collegatarius coniunctus, si liberos habeat, potior sit heredibus, etiamsi liberos habebunt. (208.) *sed* plerisque placuit, quantum ad hoc ius quod lege Papia coniunctis constituitur, nihil interesse utrum per vindicationem an per damnationem legatum sit.

209. Sinendi modo ita legamus: HERES MEUS DAMNAS ESTO SINERE LUCIUM TITIUM HOMINEM STICHUM SUMERE SIBIQUE HABERE. (210.) Quod genus legati plus quidem habet *quam* per vindicationem legatum, minus autem quam per damnationem. nam eo modo non solum suam rem testator utiliter legare potest, sed etiam heredis sui: cum alioquin per vindicationem nisi suam rem legare non potest; per damnationem autem cuiuslibet extranei rem legare potest. (211.) Sed si quidem mortis testatoris tempore res ipsius testatoris sit vel heredis, plane utile legatum est, etiamsi testamenti faciundi tempore neutrius fuerit. (212.) Quodsi post mortem testatoris

right belongs to the heirs who have children, and then, if the heirs have no children, the right belongs to the legatees who have children, yet it is laid down in the Lex Papia itself, that a co-legatee conjoined (with the person who fails to take), if he have children, is to have a claim prior to that of the heirs, even though they have children. 208. But so far as concerns this right established by the Lex Papia for conjoint legatees, it is generally held that it is immaterial whether the legacy be by vindication or by damnation.

209. We bequeath *sinendi modo* thus: "Let my heir be bound to allow Lucius Titius to take the man Stichus and have him for himself." 210. Which kind of legacy is more extensive than one by vindication, but less extensive than one by damnation. For in this way a testator can validly bequeath not only his own property, but also that of his heir. Whereas, on the other hand, by vindication he cannot bequeath anything but his own property: whilst by damnation he can bequeath the property of any stranger. 211. Now if the thing at the time of the testator's death belong either to him or to the heir, the legacy is undoubtedly valid, even though it belonged to neither at the time the testament was made. 212. But if the thing commenced to be the property

### *Sinendi modo.*

ea res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutile esse: quid ergo est? licet aliquis eam rem legaverit quae neque eius umquam fuerit, neque postea heredis eius unquam esse coeperit, ex senatusconsulto Neronianoproinde videtur ac si per damnationem relicta esset. (213.) Sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque, donec is heres tradendo vel mancipando vel in iure cedendo legatarii eam fecerit; ita et in sinendi modo legato iuris est: et ideo huius quoque legati nomine in personam actio est QUIDQUID HEREDEM EX TESTAMENTO DARE FACERE OPORTET. (214.) Sunt tamen qui putant ex hoc legato non videri obligatum heredem, ut mancipet aut in iure cedat aut tradat, sed sufficere, ut legatarium rem sumere patiatur; quia nihil ultra ei testator imperavit, quam ut sinat, id est patiatur legatarium rem sibi habere. (215.) Maior illa

of the heir after the death of the testator, it is a disputed point whether the legacy is valid: and the general opinion is that it is void. What follows then? Although a man have bequeathed a thing which was neither his at any time nor ever subsequently began to be the property of his heir, yet by the *senatusconsultum* of Nero, it is regarded as if left by damnation<sup>1</sup>. 213. In like manner as a thing bequeathed by damnation does not become the property of the legatee immediately that the inheritance is entered on, but remains the heir's, until the heir makes it the legatee's by delivery, or mancipation, or *cessio in iure*: so also is the law regarding a legacy *sinendi modo*: and therefore in respect of this legacy also the action is personal: "whatsoever the heir ought to give or do according to the testament". 214. There are, however, those who think that in this kind of legacy the heir is not to be considered bound to mancipate, make *cessio in iure*, or deliver, but that it is enough for him to allow the legatee to take the thing: because the testator laid no charge on him except that he should allow, *i. e.* suffer the legatee to have the thing for himself. 215. The following more

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<sup>1</sup> Ulp. xxiv. 11 a. Gaius probably intends the latter half of this paragraph to be a denial of the doctrine of the "plerique" of the first

half: but if so, he words his sentence so badly that he omits the very case under discussion, and that only.

<sup>2</sup> IV. 2.



### *Per praeceptionem.*

dissensio in hoc legato intervenit, si eandem rem duobus pluribusve disiunctim legasti: quidam putant utrisque solidum deberi, sicut per *damnationem*: nonnulli occupantis esse meliorem condicionem aestimant, quia cum in eo genere legati damnetur heres patientiam praestare, ut legatarius rem habeat, sequitur, ut si priori patientiam praestiterit, et is rem sumpserit, securus sit adversus eum qui postea legatum petierit, quia neque habet rem, ut patiatur eam ab eo sumi, neque dolo malo fecit quominus eam rem haberet.

216. Per praeceptionem hoc modo legamus: LUCIUS TITUS HOMINEM STICHUM PRAECIPITO. (217.) Sed nostri quidem praeceptores nulli alii eo modo legari posse putant, nisi ei qui aliqua ex parte heres scriptus esset: praecipere enim esse praecipuum sumere; quod tantum in eius personam procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit. (218.) Ideo-

important dispute arises with regard to this kind of legacy, if you have bequeathed the same thing to two or more jointly: some think the whole is due to each, as in a legacy by damnation: some consider that the condition of the one who first gets possession is the better, because, since in this description of legacy the heir is to suffer the legatee to have the thing, it follows that if he suffer the first legatee and he take the thing, he is secure against the other who subsequently demands the legacy, because he neither has the thing so as to allow it to be taken from him, nor has he fraudulently brought it to pass that he has it not.

216. By praeception we bequeath in this manner: "Let Lucius Titius first take the man Stichus." 217. But our authorities think that a bequest can be made in this form to no one who is not appointed heir in part: for *praecipere* means to take in advance: which only is possible in the case of one who is appointed heir to some part, since he can have the legacy in advance and clear of his share of the inheritance<sup>1</sup>.

<sup>1</sup> He is ordered to take "in advance." "In advance" must mean before he takes some other benefit: now an ordinary legatee takes nothing but his legacy, and therefore

*praecipito* must refer to an heir, the only legatee whom we can conceive as taking another benefit in addition to his legacy.



*Per praeceptionem.*

que si extraneo legatum fuerit, inutile est legatum, adeo ut Sabinus existimaverit ne quidem ex *senatusconsulto* Neroniano posse convallescere : nam eo, inquit, *senatusconsulto* ea tantum confirmantur quae verborum vitio iure civili non valent, non quae propter ipsam personam legatarii non deberentur. sed Iuliano ex Sexto placuit etiam hoc casu ex *senatusconsulto* confirmari legatum : nam ex verbis etiam hoc casu accidere, ut iure civili inutile sit legatum, inde manifestum esse, quod eidem aliis verbis recte legatur, velut [*per vindicationem* et *per damnationem* et] *sinendi modo* : tunc autem vitio personae legatum non valere, cum ei legatum sit cui nullo modo legari possit, velut peregrino cum quo testamenti factio non sit ; quo plane casu *senatusconsulto* locus non est. (219.) Item nostri praeceptores quod ita legatum est nulla ratione putant posse consequi cum cui ita fuerit legatum, *praeterquam* iudicio familiae erciscundae quod inter heredes de hereditate erciscunda, id est dividunda accipi solet : officio enim iudicis id

218. Therefore, if the legacy have been left to a stranger, the legacy is void, so that Sabinus thought it could not even stand by virtue of Nero's *senatusconsultum* : for he says, by that *senatusconsultum* those bequests alone are upheld which are invalid at the civil law through an error of wording, not those which are not due on account of the very character of the legatee. But Julianus, according to Sextus, thought that the legacy was in this case upheld by the *senatusconsultum* : because from the following consideration it was plain that in this case too the wording caused the invalidity of the bequest at the civil law, viz. that the legacy could be validly left in other words, as for instance, (by vindication or damnation or) *sinendi modo* : and (he said) that a legacy was invalid from defect of the person only when the legacy was to one to whom a legacy could by no means be given, for instance, to a foreigner with whom there is no *testamenti factio*<sup>1</sup> : in which case undoubtedly the *senatusconsultum* is inapplicable. 219. Likewise, our authorities think the legatee can obtain a legacy left in this manner by no other means than a *judicium familiae erciscundae*<sup>2</sup>, which is usually employed between heirs for the purpose of "erciscundae," i. e. dividing the inheritance : for it appertains to the

<sup>1</sup> Note on II. 114.

<sup>2</sup> IV. 42.

contineri, ut et quod per praeceptionem legatum est adiudicetur. (220.) Unde intellegimus nihil aliud secundum nostrorum praeceptorum opinionem per praeceptionem legari posse, nisi quod testatoris sit: nulla enim alia res quam hereditaria deducitur in hoc iudicium. itaque si non suam rem eo modo testator legaverit, iure quidem civili inutile erit legatum; sed ex senatusconsulto confirmabitur. aliquo tamen casu etiam alienam rem *per* praeceptionem legari posse fa-  
tentur: veluti si quis eam rem legaverit quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia solvere eam rem, ut possit *praecipere is* cui ita legatum sit. (221.) Sed diversae scholae auctores putant etiam extraneo per praeceptionem legari posse proinde ac si ita scribatur: TITUS HOMINEM STICHUM CAPITO, supervacuo adiecta PRAE syllaba; ideoque per *vindicationem*

duty of the *judex* to assign also a legacy by preception'. 220. We perceive from this, that according to the opinion of our authorities, nothing can be left by preception, except property of the testator: for nothing but what belongs to the inheritance can be the matter of this action. If then the testator have bequeathed in this form a thing not his own, the legacy is invalid at the civil law: but will be upheld by the *senatusconsultum*'. In a special case, however, they admit that another man's property can be left by preception: that is to say, if any one have bequeathed a thing which he has given in *mancipium* to his creditors *fiduciae causa*<sup>b</sup>: for they think the heirs can be compelled by the executive power<sup>c</sup> of the *judex* to release the thing by payment of the money, so that he to whom it is so left may take it in advance. 221. But the authorities of the other school think that a legacy can be left by preception even to a stranger, just as if the wording were thus: "Let Titius take the man Stichus," the syllable *prae* being added superfluously: and therefore that such a

<sup>1</sup> "Also," i. e. in addition to his proper function of dividing the inheritance.

<sup>2</sup> Sc. of Nero, II. 197.

<sup>3</sup> "Originally it was customary to transfer to the creditor the property in a subject by mancipation, with a promise, however, by the creditor, at

the moment of mancipation, to deliver the property back (*pactum de emancipando, fiducia*)." Savigny, *On Possession*, translated by Perry, p. 216.

<sup>4</sup> Dirksen, sub verbo, § 2. A. *Officium = muneris pars, executio*.

*rem* legatam videri. quae sententia dicitur divi Hadriani constitutione confirmata esse. (222.) Secundum hanc igitur opinionem, si ea res *ex iure Quiritium* defuncti fuerit, *potest* a legatario vindicari, sive is unus ex heredibus sit sive extraneus : et si in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi vero familiae heriscundae iudicis officio praestabitur. quod si nullo iure fuerit testatoris, tam heredi quam extraneo ex senatusconsulto utile erit. (223.) Sive tamen heredibus, secundum nostrorum opinionem, sive etiam extraneis, secundum illorum opinionem, duobus pluribusve eadem res coniunctim aut disiunctim legata fuerit, singuli partes habere debent.

## AD LEGEM FALCIDIAM.

224. Sed olim quidem licebat totum patrimonium legatis

legacy appears to be one by vindication, an opinion which is said to be confirmed by a constitution of the late emperor Hadrian. 222. According to this opinion, therefore, if the thing belonged to the deceased, *ex iure Quiritium*, it can be "vindicated"<sup>1</sup> by the legatee, whether he be one of the heirs or a stranger : and if it only belonged to the testator *in bonis*<sup>2</sup>, the legacy, if left to a stranger, will be valid by the *senatusconsultum*, but, if to the heir, will be paid over to him by the executive authority of the *iudex* in the *actio familiae heriscundae*<sup>3</sup> : whilst if it belonged to the testator by no title at all, it will be valid, whether to an heir or a stranger, by reason of the *senatusconsultum*<sup>4</sup>. 223. If the same thing have been left to two or more conjointly or disjunctly, whether it be to heirs, according to our opinion, or to strangers too, according to theirs, all must take equal shares<sup>5</sup>.

224. In olden times indeed it was lawful to expend the

<sup>1</sup> II. 194.

<sup>2</sup> II. 40, 41.

<sup>3</sup> The derivation of the word *cundae* is given by Festus thus: "Erectum citumque sit inter consortes, ut in libris legum Romanarum legitur. Erectum a coercendo dictum, unde et heriscundae et herisci. Citum autem vocatum est a ciendo." The sense of this may be thus given: "Between co-heirs, as we read in the Roman law-books, property is

to be *erectum citumque*. *Erectum* is a word connected with *coerceo*, to gather together, *citum* from *cio*, to portion out." Hence the notion of Festus is that *herisci* implies "to gather together and then apportion." A joint inheritance is *erectum citumque*, an inheritance to a single heir *erectum nec citum*. See Olivetus' note on Cic. *de Orat.* 1. 56.

<sup>4</sup> Sc. of Nero, II. 197.

<sup>5</sup> See Appendix (H).

atque libertatibus erogare, nec quicquam heredi relinquere praeterquam inane nomen heredis; idque lex XII tabularum permittere videbatur, qua cavetur, ut quod quisque de re sua testatus esset, id ratum haberetur, his verbis: UTI LEGASSIT SUAE REI, ITA IUS ESTO. quare qui scripti heredes erant, ab hereditate se abstinebant; et idcirco plerique intestati moriebantur. (225.) Itaque lata est lex Furia, qua, exceptis personis quibusdam, ceteris plus mille assibus legatorum nomine mortisve causa capere permissum non est. sed et haec lex non perfecit quod voluit. qui enim verbi gratia quinque milium aeris patrimonium habebat, poterat quinque hominibus singulis millenos asses legando totum patrimonium erogare. (226.) Ideo postea lata est lex Voconia, qua cautum est, ne cui plus legatorum nomine mortisve causa capere liceret quam heredes caperent. ex qua lege plane quidem aliquid utique heredes habere videbantur; sed tamen fere vitium simile nasce-

whole of a patrimony in legacies and gifts of freedom, and leave nothing to the heir, except the bare title of heir: and this a law of the Twelve Tables seemed to permit, wherein it is provided, that whatever disposition a man made of his property, should be valid, in the words, "In accordance with the bequests of his property which a man has made, so let the right be<sup>1</sup>." Wherefore those instituted heirs often abstained from the inheritance: and on that account many persons died intestate. 225. For this reason the Lex Furia<sup>2</sup> was passed, whereby it was forbidden for any person, certain exceptions however being made, to take more than a thousand asses by way of legacy or donation *mortis causa*<sup>3</sup>. But this law did not accomplish what it intended. For a man who had, for instance, a patrimony of five thousand asses, could expend his whole patrimony by bequeathing a thousand asses to each of five men. 226. Therefore, afterwards, the Lex Voconia<sup>4</sup> was passed, whereby it was provided, that no one should be allowed to take more by way of legacy or donation *mortis causa* than the heirs took. Through this law the heirs seemed certain to have something at any rate: but yet a

<sup>1</sup> Tab. v. l. 3.

<sup>2</sup> B.C. 182. A different law from the *Lex Furia Caninia* named in L.

<sup>3</sup> Ulp. 1. 2.

<sup>4</sup> Just. *Inst.* II. 7. 1.

<sup>5</sup> B.C. 168.

batur: nam in multas legatariorum personas distributo patrimonio poterant adeo heredi minimum relinquere, ut non expediret heredi huius lucri gratia totius hereditatis onera sustinere. (227.) Lata est itaque lex Falcidia, qua cautum est, ne plus ei legare liceat quam dodrantem. itaque necesse est, ut heres quartam partem hereditatis habeat. et hoc *nunc* iure utimur. (228.) In libertatibus quoque dandis nimiam licentiam conspexit lex Furia Caninia, sicut in primo commentario rettulimus.

DE INUTILITER RELICTIS LEGATIS.

229. Ante heredis institutionem inutiliter legatur, scilicet quia testamenta vim ex institutione heredis accipiunt, et ob id velut caput et fundamentum intelligitur totius testamenti heredis institutio. (230.) Pari ratione nec libertas ante heredis institutionem dari potest. (231.) Nostri praeceptores nec tutorem eo loco dari posse existimant: sed Labeo et Proculus

mischief almost similar to the other arose: for by the patrimony being distributed amongst a large number of legatees, testators could leave so very little to the heir, that it would not be worth his while for the sake of this profit to sustain the burdens of the entire inheritance. 227. Therefore, the Lex Falcidia<sup>1</sup> was passed, by which it was provided, that the testator should not be allowed to dispose of more than three-fourths in legacies. And thus the heir of necessity must have a fourth of the inheritance. And this is the law we now observe. 228. The Lex Furia Caninia, as we have stated in the first commentary, has also checked extravagance in the bestowal of gifts of freedom<sup>2</sup>.

229. A legacy is invalid if set down before the institution of the heir, plainly because testaments derive their efficacy from the institution of the heir<sup>3</sup>, and therefore that institution is regarded as the head and foundation of the entire testament. 230. For a like reason, liberty too cannot be given before the institution of the heir<sup>4</sup>. 231. Our authorities think that a tutor also cannot be given in that place: but Labeo and

<sup>1</sup> R.C. 39. Ulpian, XXIV. 32.

<sup>2</sup> L. 42.

<sup>3</sup> Ulpian, XXIV. 15.

<sup>4</sup> Ibid. I. 20.

tutorem posse dari, quod nihil ex hereditate erogatur tutoris datione.

232. Post mortem quoque heredis inutiliter legatur; id est hoc modo: CUM HERES MEUS MORTUUS ERIT, DO LEGO, aut DATO. Ita autem recte legatur: CUM HERES MORIETUR: quia non post mortem heredis relinquitur, sed ultimo vitae eius tempore. Rursum ita non potest legari: PRIDIE QUAM HERES MEUS MORIETUR. quod non pretiosa ratione receptum videtur. (233.) Eadem et de libertatibus dicta intellegemus. (234.) Tutor vero an post mortem heredis dari possit quaerentibus eadem forsitan poterit esse quaestio, quae de eo agitur qui ante heredum institutionem datur.

DE POENAE CAUSA RELICTIS LEGATIS.

235. Poenae quoque nomine inutiliter legatur. poenae autem nomine legari videtur quod coercendi heredis causa relinquitur, quo magis heres aliquid faciat aut non faciat; velut quod ita legatur: SI HERES MEUS FILIAM SUAM TITIO IN MA-

Proculus think a tutor can be given, because no charge is laid upon the inheritance by the giving of a tutor.

232. A bequest (to take effect) after the death of the heir is also invalid<sup>1</sup>: that is, one in the form: "When my heir shall be dead, I give and bequeath," or "let him give." But it is validly bequeathed in the words: "When my heir shall be dying:" because it is not left after the decease of the heir, but at the last moment of his life. Again, a legacy cannot be left thus: "The day before my heir shall die." Which rule seems adopted for no good reason. 233. The same remarks we understand to be made with regard to gifts of freedom. 234. But if it be asked whether a tutor can be given after the death of the heir, perhaps the question will be the same as that discussed regarding him who is given before the institution of the heir<sup>2</sup>.

235. A legacy by way of penalty is also invalid<sup>3</sup>. Now a legacy is considered to be by way of penalty, which is left for the purpose of constraining the heir, to prevent him doing or not doing something: for instance, a legacy in these terms: "If my heir shall bestow his daughter in marriage on Titius,

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<sup>1</sup> Ulpian, XXIV. 16.

<sup>2</sup> II. 231.

<sup>3</sup> Ulpian, XXIV. 17.

TRIMONIUM COLLOCAVERIT, X MILIA SEIO DATO; vel ita: SI FILIAM TITIO IN MATRIMONIUM NON COLLOCAVERIS, X MILIA TITIO DATO. sed et si heres verbi gratia intra biennium monumentum sibi non fecerit, x Titio dari iusserit, poenae nomine legatum est. et denique ex ipsa definitione multas similes species proprias fingere possumus. (236.) Nec libertas quidem poenae nomine dari potest; quamvis de ea re fuerit quaesitum. (237.) De tutore vero nihil possumus quaerere, quia non potest datione tutoris heres compelli quidquam facere aut non facere; ideoque nec datur poenae nomine tutor; et si datus fuerit, magis sub condicione quam poenae nomine datus videbitur.

238. Incertae personae legatum inutiliter relinquitur. incerta autem videtur persona quam per incertam opinionem animo suo testator subicit, *velut si* ita legatum sit: QUI PRIMUS AD FUNUS MEUM VENERIT, EI HERES MEUS X MILIA DATO.

let him give ten thousand sesterces to Seius:" or thus: "If you do not bestow your daughter in marriage on Titius, give ten thousand to Titius." And also<sup>1</sup>, if he shall have ordered ten thousand to be given to Titius, "if the heir do not," for example, "set up a monument to him within two years," the legacy is by way of penalty. And in fact, from the mere definition we can invent many special cases of like character. 236. Not even freedom can be given by way of penalty, although this point has been questioned. 237. But as to a tutor, we can raise no question, because the heir cannot be compelled by the giving of a tutor to do or not to do anything: and therefore a tutor is not given by way of penalty: and if one be given, he is considered to be given under a condition rather than by way of penalty.

238. A legacy to an uncertain person is invalid<sup>2</sup>. Now an uncertain person is considered to be one whom the testator brings before his mind without any clear notion of his individuality, for instance, if a legacy be given in these terms: "Let my heir give ten thousand sesterces to him who first

<sup>1</sup> The *si* must be repeated: "Sed et si, si heres, etc." Conf. II 155. them to be regarded as purely conditional.

Legacies "poenae nomine" were made valid by Justinian, who ordered <sup>2</sup> Ulpian, XXIV. 18.



idem iuris est, si generaliter omnibus legaverit: QUICUMQUE AD FUNUS MEUM VENERIT. *in eadem causa est quod ita relinquitur: QUICUMQUE FILIO MEO IN MATRIMONIUM FILIAM SUAM CONLOCAVERIT, EI HERES MEUS X MILIA DATO.* illud quoque in eadem causa est quod ita relinquitur: QUI POST TESTAMENTUM CONSULES DESIGNATI ERUNT, aequae incertis personis legari videtur. et denique aliae multi huiusmodi species sunt. Sub certa vero demonstratione incertae personae recte legatur, velut: EX COGNATIS MEIS QUI NUNC SUNT QUI PRIMUS AD FUNUS MEUM VENERIT, EI X MILIA HERES MEUS DATO. (239.) Libertas quoque non videtur incertae personae dari posse, quia lex Furia Caninia iubet nominatim servos liberari. (240.) Tutor quoque certus dari debet.

241. Postumo quoque alieno inutiliter legatur. *est autem alienus postumus, qui natus inter suos heredes testatori futurus non est. ideoque ex emancipato quoque filio conceptus nepos extraneus est postumus aro; item qui in utero est eius quae*

comes to my funeral." The law is the same if he have made a general bequest to all: "Whosoever shall come to my funeral." Of the same character is a bequest thus made: "Let my heir give ten thousand to whatever man bestows his daughter in marriage on my son." And of the same character too is a bequest made thus: "Whoever shall be consuls designate after my testament (comes into operation);" for it is in like manner regarded as a legacy to uncertain persons. And there are in fine many other instances of this kind. But a legacy is validly left to an uncertain person under a definite description, for instance; "Let my heir give ten thousand to that one of my relations now alive who first comes to my funeral." 239. It is also not considered allowable for liberty to be given to an uncertain person, because the Lex Furia Caninia orders slaves to be liberated by name<sup>1</sup>. 240. A person given as a tutor ought also to be definite.

241. A legacy left to a posthumous stranger is also invalid. Now a posthumous stranger is a person who, if born, would not be a *suius heres* of the testator. Therefore even a grandchild conceived from an emancipated son is a posthumous stranger in regard to his grandfather: likewise the child conceived by

<sup>1</sup> Ulpian, L. 25. See note on L. 45.



*conubio non interveniente ducta est uxor, extraneus postumus patri contingit.*

242. Ac ne heres quidem potest institui postumus alienus: est enim incerta persona. (243.) Cetera vero quæ supra diximus ad legata proprie pertinent; quamquam non inmerito quibusdam placeat poenae nomine heredem institui non posse: nihil enim intererit, utrum legatum dare iubeatur heres, si fecerit aliquid aut non fecerit, an coheres ei adiciatur; quia tam coheredis adiectione quam legati datione conpellitur, ut aliquid contra propositum suum faciat.

244. An ei qui in potestate sit eius quem heredem institui-  
mus recte legemus, quaeritur. Servius recte legari probat, sed evanescere legatum, si quo tempore dies legatorum cedere so-  
let, adhuc in potestate sit; ideoque sive pure legatum sit et vivo testatore id potestate heredis esse desierit, sive sub con-  
dicione et ante condicionem in acciderit, deberi legatum. Sa-

a wife who was married without *conubium* is a posthumous stranger in regard to his father.

242. A posthumous stranger cannot even be appointed heir: for he is an uncertain person<sup>1</sup>. 243. But all the other points which we have mentioned above<sup>2</sup> apply to legacies solely: although some hold, not without reason, that an heir cannot be instituted by way of penalty: for it will make no difference whether the heir be bidden to give a legacy in case he do or fail to do something, or whether a co-heir be joined on to him: because as well by the addition of a co-heir, as by the giving of a legacy, he is compelled to do something against his wish.

244. It is a disputed point whether we can validly give a legacy to one who is in the *potestas* of him whom we institute heir<sup>3</sup>. Servius maintains that the legacy is valid, but becomes void if the legatee be still in *potestas* at the time when the legacy usually vests<sup>4</sup>; and therefore, if either the legacy be left un-  
conditionally, and during the testator's lifetime he cease to be in the *potestas* of the heir; or under condition, and the same occur before fulfilment of the condition, the legacy is due.

<sup>1</sup> II. 238.

<sup>2</sup> II. 229, 232, 233.

<sup>3</sup> Ulpian, XXIV. 23.

<sup>4</sup> "Cedere diem significat inci-

pere deberi pecuniam: venire diem, significat eum diem venisse, quo pecunia peti potest." Ulpian. See D. 50. 16. 213. pr.

*Legatees under the potestas of the heir.*

binus et Cassius sub condicione recte legari, pure non recte, putant: licet enim vivo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intelligi oportere, quia quod nullas vires habiturum foret, si statim post testamentum factum decessisset testator, hoc ideo valere quia vitam longius traxerit, absurdum esset. diversae scholae auctores nec sub condicione recte legari *putant*, quia quos in potestate habemus, eis non magis sub condicione quam pure debere possumus. (245.) Ex diverso constat ab eo qui in potestate *tua* est, herede instituto, recte tibi legari: sed si tu per eum heres extiteris, evanescere legatum, quia ipse tibi legatum debere non possis; si vero filius emancipatus aut servus manumissus erit vel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.

246. Hinc transeamus ad fideicommissa.

Sabinus and Cassius think that a legacy can be left validly under condition, not validly unconditionally: for that although the legatee may happen to cease to be in the *potestas* of the heir during the testator's lifetime, yet the legacy ought to be considered invalid for this reason, that it is absurd that what would have been invalid, if the testator had died immediately after making the testament, should be valid because he has lived longer'. The authorities of the other school think that a legacy cannot be left validly even under a condition, because we cannot be indebted to those who are in our *potestas* any more under a condition than unconditionally. 245. (On the contrary, it is allowed that a legacy can validly be given to you, payable by one under your *potestas* who is instituted heir<sup>1</sup>: yet if you become heir through him, the legacy is inoperative, because you cannot owe a legacy to yourself: but if the son be emancipated, or the slave manumitted or transferred to another, and become heir himself or make another heir, the legacy is due.

246. Now let us pass on to *fideicommissa*<sup>2</sup>.

<sup>1</sup> This is Cato's rule: "Quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocunque decesserit, non valere." D. 34. 7. 1. pr.

<sup>2</sup> Ulpian, XXIV. 24.

<sup>3</sup> *Fideicommissum* was a bequest given by way of request, not by way

of order; and was held to be due on the equitable ground of respecting the testator's desires: "Fideicommissum est quod non civilibus verbis, sed precative relinquitur, nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis." Ulpian, XXV. 1.

247. Et prius de hereditatibus videamus.

248. Inprimis igitur sciendum est opus esse, ut aliquis heres recto iure instituatur, eiusque fidei committatur, ut eam hereditatem alii restituat : alioquin inutile est testamentum in quo nemo recto iure heres instituitur. (249.) Verba autem utilia fideicommissorum haec recte maxime in usu esse videntur : PETO, ROGO, VOLO, FIDEICOMMITTO : quae proinde firma singula sunt, atque si omnia in unum congesta sint. (250.) Cum igitur scripserimus : LUCIUS TITIUS HERES ESTO, possumus adicere : ROGO TE, LUCI TITI, PETOQUE A TE, UT CUM PRIMUM POSSIS HEREDITATEM MEAM ADIRE, GAIO SEIO REDDAS RESTITUAS. possumus autem et de parte restituenda rogare ; et liberum est vel sub condicione vel pure relinquere fideicommissa, vel ex die certa. (251.) Restituta autem hereditate is qui restituit nihilominus heres permanet ; is vero qui recipit hereditatem, aliquando heredis loco est, aliquando legatarii. (252.) Olim autem nec heredis loco erat nec legatarii, sed potius emptoris. tunc enim in usu erat ei cui restituebatur hereditas nummo uno eam

247. And first let us consider as to inheritances.

248. First, then, we must know that some heir must be instituted in due form, and that it must be entrusted to his good faith that he deliver over the inheritance to another : for if this be not done, a testament is invalid in which no heir is instituted in due form. 249. The proper phraseology for *fideicommissa* generally employed is this : "I beg, I ask, I wish, I commit to your good faith:" and these words are equally binding when employed singly, as though they were all united into one. 250. When, therefore, we have written : "Let Lucius Titius be heir;" we may add : "I ask you, Lucius Titius, and beg of you, that as soon as you can enter on my inheritance, you will render and deliver it over to Gaius Seius." We may also ask him to deliver over a part : and it is in our power to leave *fideicommissa* either under condition, or unconditionally, or from a specified day. 251. Now when the inheritance is delivered over, he who has delivered it still remains heir : but he who receives the inheritance is sometimes in the place of heir, sometimes of legatee. 252. But formerly he used to be neither in the place of heir nor of legatee, but rather of purchaser. For it was then usual for the inheritance to be sold for a single coin and as a mere formality to him to whom it

hereditatem dicis causa venire ; et quae stipulationes inter *ditorem hereditatis et emptorem interponi solent, eadem interponantur inter heredem et eum cui restituebatur hereditas*, id est hoc modo : heres quidem stipulabatur ab eo cui restituebatur hereditas, ut quicquid hereditario nomine condemnatus fuisset, sive quid alias bona fide dedisset, eo nomine indemnus esset, et omnino si quis cum eo hereditario nomine ageret, ut recte defenderetur : ille vero qui recipiebat hereditatem invicem stipulabatur, ut si quid ex hereditate ad heredem pervenisset, id sibi restitueretur ; ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine exequi.

253. Sed posterioribus temporibus Trebellio Maximo et Annaeo Seneca Consulibus senatusconsultum factum est, quo cautum est, ut si cui hereditas ex fideicommissi causa restituta sit, actiones quae iure civili heredi et in heredem competerent ei et in eum darentur cui ex fideicommisso restituta esset hereditas.

was delivered over : and the same stipulations<sup>1</sup> which are usually entered into between the vendor and the purchaser of an inheritance, were entered into between the heir and the person to whom the inheritance was delivered over, i.e. in the following manner : the heir on his part stipulated with him to whom the inheritance was delivered over, that he should be indemnified for any amount in which he was mulcted in connexion with the inheritance, or for anything which he had given *bona fide* to another, and generally, that if any one brought an action against him in connexion with the inheritance he should be duly defended : whilst the receiver of the inheritance stipulated in his turn, that if any thing should (afterwards) come to the heir from the inheritance, that should be delivered over to him : and that he should also allow him to bring actions concerning the inheritance, in the capacity of *procurator* or *cognitor*<sup>2</sup>.

253. But at a later period, when Trebellius Maximus and Annaeus Seneca were consuls, a *senatusconsultum* was enacted, whereby it was provided, that if an inheritance were delivered over to any one on the ground of *fideicommissum*, the actions which by the civil law would lie for and against the heir, should be granted for and against him to whom the inheritance

post quod *senatusconsultum* desierunt illae cautiones in usu haberi. Praetor enim utiles actiones ei et in eum qui recepit hereditatem, quasi heredi et in heredem dare coepit, *et*que in edicto proponuntur. (254.) Sed rursus quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id extinguebantur *fideicommissa*, Pegaso et Pusione *Consulibus* senatus censuit, ut ei qui rogatus esset hereditatem restituere perinde liceret quartam partem retinere, atque e lege Falcidia in legatis retinendi ius conceditur. ex singulis quoque rebus quae per *fideicommissum* relinquuntur eadem retentio permissa est. per quod *senatusconsultum* ipse onera hereditaria sustinet; ille autem qui ex *fideicommisso* reliquam partem hereditatis recipit, legatarii partiarum loco est, id est eius legatarii cui pars bonorum legatur. quae species legati *partitio* vocatur, quia cum herede legatarius par-

was delivered over in accordance with the *fideicommissum*. After the passing of which *senatusconsultum*, these securities (the stipulations) ceased to be used. For the Praetor began to grant *utiles actiones*<sup>1</sup> for and against the receiver of the inheritance, as if they were for and against the heir, and these are set forth in the edict. 254. But again, since written heirs, being generally asked to deliver over the whole or nearly the whole of an inheritance, refused to enter on the inheritance for little or no gain, and thus *fideicommissa* fell to the ground, therefore in the consulship of Pegasus and Pusio the senate decreed, that he who was asked to deliver over the inheritance should be allowed to retain a fourth part, just as this right of retention is permitted by the Falcidian law in respect of legacies. The same retention is also allowed in the case of individual things left by *fideicommissum*. By this *senatusconsultum* the heir himself sustains the burdens of the inheritance, whilst he who receives the rest of the inheritance by virtue of the *fideicommissum*, is in the position of a partiar legatee, i.e. of a legatee to whom a portion of the goods is left. Which species of legacy is called *partitio*<sup>2</sup>, because the legatee shares (*partitur*) the inheritance with the heir. The

<sup>1</sup> See note on II. 78.

<sup>2</sup> Ulpian, XXIV. 25.

titur hereditatem. unde effectum est, ut quae solent stipulationes inter heredem et partiarium legatarium interponi, eadem interponantur inter eum qui ex fideicommissi causa recipit hereditatem et heredem, id est ut et lucrum et damnum hereditarium pro rata parte inter eos commune sit. (255.) Ergo si quidem non plus quam dodrantem hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano *senatusconsulto* restituitur hereditas, et in utrumque actiones hereditariae pro rata parte dantur: in heredem quidem iure civili, in eum vero qui recipit hereditatem ex *senatusconsulto Trebelliano*. quamquam heres etiam pro ea parte quam restituit heres permanet, eique et in eum solidae actiones competunt: sed non ulterius oneratur, nec ulterius illi dantur actiones, quam apud eum commodum hereditatis remanet. (256.) At si quis plus quam dodrantem vel etiam totam hereditatem restituere rogatus sit, locus est Pegasiano *senatusconsulto*. (257.) Sed is qui semel adierit hereditatem, si modo sua voluntate adierit, sive retinue-

result of this is that the same stipulations which are usually entered into between the heir and the partiarly legatee, are also entered into between him who receives the inheritance by way of *fideicommissum* and the heir, i.e. that the gain and loss of the inheritance shall be shared between them in proportion to their interests. 255. If then the written heir be asked to deliver over not more than three-fourths of the inheritance, the inheritance is thereupon delivered over in accordance with the *senatusconsultum Trebellianum*, and actions in connexion with the inheritance are allowed against both parties according to the extent of their interests<sup>1</sup>: against the heir by the civil law, and against him who receives the inheritance by the *senatusconsultum Trebellianum*. Although the heir remains heir even for the part he has delivered over, and actions as to the whole lie for and against him: but he is not burdened, nor are actions granted to him (for his own benefit) beyond the interest in the inheritance which belongs to him. 256. But if he be asked to deliver over more than three-fourths, or even the whole inheritance, the *senatusconsultum Pegasianum* applies. 257. But he who has once entered on the inheritance, if only he have done it of his own free will,

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<sup>1</sup> Ulpian, xxv. 14.

rit quartam partem sive noluerit retinere, ipse universa onera hereditaria sustinet: sed quarta quidem retenta quasi partis et pro parte stipulationes interponi debent tamquam inter partiarium legatarium et heredem; si vero totam hereditatem restituerit, ad exemplum emptae et venditae hereditatis stipulationes interponendae sunt. (258.) Sed si recuset scriptus heres adire hereditatem, ob id quod dicat eam sibi suspectam esse quasi damnosam, cavetur Pegasiano senatusconsulto, ut desiderante eo cui restituere rogatus est, iussu Praetoris adeat et restituat, perindeque ei et in eum qui receperit actiones dentur, ac iuris est ex senatusconsulto Trebelliano. quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui receperit hereditatem.

259. Nihil autem interest utrum aliquis ex asse heres institutus aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis

whether he retain or do not wish to retain the fourth part, sustains all the burdens of the inheritance himself; but when the fourth is retained, stipulations resembling those called *partis et pro parte* ought to be employed, as between a partiarly legatee and an heir: and if he have delivered over the whole inheritance, stipulations resembling those of a bought and sold inheritance must be employed. 258. But if the written heir refuse to enter upon the inheritance, because he says that it is suspected by him of being ruinous, it is provided by the *senatusconsultum Pegasianum*, that at the request of him to whom he is asked to deliver it over, he shall enter by order of the Praetor and deliver it over, and that actions are to be allowed for and against him who has received it, as in the rule under the *senatusconsultum Trebellianum*. In which case there is need of no stipulations, because at the same time security is afforded to him who has delivered over the inheritance, and the actions attaching to it are transferred to and against him who has received it.

259. It makes no matter whether a man instituted heir to the whole inheritance be requested to deliver over the inheritance wholly or partly, or whether the heir instituted to a part be requested to deliver over the part or part of the part: for in the latter case too it is usual for account to be taken of



partem restituere rogetur : nam et hoc casu de quarta parte eius partis ratio ex *Pegasiano* senatusconsulto haberi solet.

260. Potest autem quisque etiam res singulas per fideicommissum relinquere, velut fundum, hominem, vestem, argentum, pecuniam ; et vel ipsum heredem rogare, ut alicui restituat, vel legatarium, quamvis a legatario legari non possit. (261.) Item potest non solum propria testatoris res per fideicommissum relinqui, sed etiam heredis aut legatarii aut cuiuslibet alterius. itaque et legatarius non solum de ea re rogari potest, ut eam alicui restituat, quae ei legata sit, sed etiam de alia, sive ipsius legatarii sive aliena sit. sed hoc solum observandum est, ne plus quisquam rogetur alicui restituere, quam ipse ex testamento ceperit : nam quod amplius est inutiliter relinquitur. (262.) Cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est, aut ipsam redimere et praestare, aut aestimationem eius solvere. sicut iuris est, si per damnationem aliena res legata sit. sunt tamen qui putant, si rem per fideicommissum

the fourth of that part according to the *senatusconsultum sianum*.

260. A man can also leave individual things by *fideicommissum*, as a field, a slave, a garment, plate, money : and can ask either the heir or a legatee to deliver it over to some one, although a legacy cannot be charged upon a legatee<sup>1</sup>. 261. Likewise, not only can the testator's own property be left by *fideicommissum*, but that of the heir also, or a legatee, or any one else<sup>2</sup>. Therefore, not only can a request for re-delivery to another be addressed to the legatee with respect to the very thing left to him, but also with respect to a different thing, whether it belong to the legatee himself or to a stranger. But this only is to be observed, that no one may be asked to deliver over to another, more than he himself has taken under the testament : for the bequest of the excess is inoperative. 262. Also, when another man's property is left by *fideicommissum*, it is incumbent on the person asked to deliver it, either to purchase the very thing and hand it over, or to pay its value. Exactly as the rule is when another man's property is left by damnation<sup>3</sup>. There are, however, those who think that if the owner will not sell a thing left by *fidei-*

<sup>1</sup> Ulpian, XXIV. 20.

<sup>2</sup> Ibid. XXV. 5.

<sup>3</sup> II. 202.



relictam dominus non vendat, extinguere fideicommissum; sed aliam esse causam per damnationem legati.

263. Libertas quoque servo per fideicommissum dari potest, ut vel heres rogetur manumittere, vel legatarius. (264.) *Nec interest utrum de suo proprio servo testator roget, an de eo qui ipsius heredis aut legatarii vel etiam extranei sit.* (265.) Itaque et alienus servus redimi et manumitti debet. quod *si dominus eum non vendat, sane extinguitur libertas, quia pro libertate pretii computatio nulla intervenit.* (266.) Qui autem ex fideicommisso manumittitur, non testatoris fit *libertus etiamsi testatoris servus sit, sed eius qui manumittit.* (267.) At qui directo, testamento, liber esse iubetur, *velut hoc modo: STICHUS SERVUS MEUS LIBER ESTO, vel STICHUM SERVUM MEUM LIBERUM ESSE IUBEO, is ipsius testatoris fit libertus.* Nec alius ullus directo, ex testamento, libertatem habere potest, quam qui utroque

*commissum* the *fideicommissum* is extinguished: but that the case is different with a legacy by damnation.

263. Liberty can also be given to a slave by *fideicommissum*, in such manner that either the heir or a legatee may be asked to manumit him. 264. Nor does it matter whether the testator make request as to his own slave, or one belonging to the heir himself, or to a legatee, or even to a stranger<sup>1</sup>. 265. And therefore, even a stranger's slave must be bought and manumitted. But if the owner will not sell him, clearly the gift of liberty is extinguished<sup>2</sup>, because no calculation of the value of liberty is possible. 266. Now he who is manumitted in accordance with a *fideicommissum*, does not become the freedman of the testator, even though he be the testator's slave, but the freedman of the person who manumits him<sup>3</sup>. 267. But he who is ordered to be free by direct bequest in a testament, for instance, in the following words: "Let my slave Stichus be free," or, "I order my slave Stichus to be free," becomes a freedman of the testator himself<sup>4</sup>: no one, however, can have liberty directly by virtue of a testament,

<sup>1</sup> Ulpian, II. 10.

<sup>2</sup> Ulpian, II. 11. Lit. "no calculation of price instead of liberty." For the alteration of this rule see Just. *Inst.* II. 24. 2.

<sup>3</sup> This is a point of importance,

because, as stated in note on I. 37, the *libertus* owes to his *patronus* certain duties.

<sup>4</sup> Such a freedman is called *libertus originarius*. Ulpian, II. 7, 8.

tempore testatoris *ex iure Quiritium* fuerit, et quo faceret testamentum et quo moreretur.

268. Multum autem differunt quae per fideicommissum relinquuntur ab his quae directo iure legantur. (269.) Nam ecce per fideicommissum etiam *nutu* hereditas relinqui potest: cum alioquin legatum nisi testamento *facto* inutile sit. (270.) Item intestatus moriturus potest ab eo ad quem bona eius pertinent *fideicommissum* alicui relinquere: cum alioquin ab eo legari non possit. (270a.) Item legatum *codicillis* relictum non aliter valet, quam si a testatore confirmati fuerint, id est nisi in testamento *caverit* testator, ut quidquid in *codicillis* scripserit id ratum sit: fideicommissum vero etiam non confirmatis *codicillis* relinqui potest. (271.) Item a legatario legari non potest: sed fideicommissum relinqui potest. quin etiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum re-

except one who belonged to the testator *ex iure Quiritium* at both times, viz. that at which he made the testament, and that at which he died<sup>1</sup>.

268. Things left by *fideicommissum* differ much from legacies left directly<sup>2</sup>. 269. For, as an instance, an inheritance can be left by *fideicommissum* even by a nod<sup>3</sup>: whilst on the contrary, a legacy, unless a testament be made, is invalid. 270. Also a man about to die intestate can leave a *fideicommissum* chargeable on him upon whom his goods devolve: although, on the contrary, a legacy cannot be charged upon such an one. 270a. Likewise, a legacy left in *codicils* is not valid, unless the *codicils* be confirmed by the testator, i.e. unless the testator insert a proviso in his testament that what he has written in the *codicils* shall stand good, but a *fideicommissum* can be left even in unconfirmed *codicils*<sup>4</sup>. 271. Likewise, a legacy cannot be charged upon a legatee, but a *fideicommissum* can be so charged<sup>5</sup>. Moreover we can leave to a second person a further *fideicommissum* chargeable on a man to whom we

<sup>1</sup> Ulpian, I. 23.

<sup>2</sup> Justinian assimilated legacies and *fideicommissa* in all respects. See *Inst.* II. 20. 3.

<sup>3</sup> Ulpian, XXV. 3. D. 32. (Lib. III.) 21. pr.

<sup>4</sup> The law regarding *codicils* is to

be found in *Just. Inst.* II. 25. See Sanders' *Justinian*, p. 349. A *codicil* confirmed would become part of the testament, and the legacy thus become binding.

<sup>5</sup> II. 260,

linquere possumus. (272.) Item servo alieno directo libertas dari non potest: sed per fideicommissum potest. (273.) Item codicillis nemo heres institui potest neque exheredari, quamvis testamento confirmati sint. at hic qui testamento heres institutus est potest codicillis rogari, ut eam hereditatem alii totam vel ex parte restituat, quamvis testamento codicilli confirmati non sint. (274.) Item mulier quae ab eo qui centum milia aeris census est per legem Voconiam heres institui non potest, tamen fideicommisso relictam sibi hereditatem capere potest. (275.) Latini quoque qui hereditates legataque directo iure lege Iunia capere prohibentur, ex fideicommisso capere possunt. (276.) Item cum senatusconsulto prohibitum sit proprium servum minorem annis xxx liberum et heredem instituere, plerisque placet posse nos iubere liberum esse, cum annorum xxx erit, et rogare, ut tunc illi restituatur hereditas. (277.) Item

already have left a *fideicommissum*. 272. Likewise, liberty cannot be given directly to another man's slave, but it can be given by *fideicommissum*<sup>1</sup>. 273. Likewise, no one can be instituted heir or disinherited by codicils, even though they be confirmed by testament. But the heir instituted by testament may be asked in codicils to deliver over the inheritance, wholly or in part, to another, even though the codicils be not confirmed by testament<sup>2</sup>. 274. Likewise, a woman, who by the Lex Voconia could not be instituted heir by any one registered<sup>3</sup> as having more than 100,000 *asses*, may still take an inheritance left her by *fideicommissum*. 275. Latins also, who are prevented by the Lex Junia from taking inheritances or legacies bequeathed directly, can take by *fideicommissum*<sup>4</sup>. 276. Likewise, although we are forbidden by a *senatusconsultum* to appoint free and heir our own slave who is under thirty years of age, yet it is generally held that we may order him to be free when he shall arrive at the age of thirty, and ask that the inheritance be then delivered over to him<sup>5</sup>.

<sup>1</sup> II. 264, 267.

<sup>2</sup> Ulpian, XXV. 11.

<sup>3</sup> Sc. by the censors. The law is referred to by Cicero, in *Terrenti*, II. I. c. 42, *Pro Balbo*, c. 8, and *De Republica*, III. c. 10. Another provision of the law is mentioned in II. 226.

<sup>4</sup> I. 23, 24.

<sup>5</sup> I. 18. It was not by a *consultum* but by a *Lex* (*Aelia Sentia*) that men were forbidden to manumit a slave under thirty: still there need be no contradiction between this passage and I. 18. Tes-

quamvis non *possimus* post mortem eius qui nobis heres extiterit, alium in locum eius heredem instituere, tamen possumus eum rogare, ut cum morietur, alii eam hereditatem totam vel ex parte restituat. et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus: CUM TITIUS HERES MEUS MORTUUS ERIT, VOLO HEREDITATEM MEAM AD PUBLIUM MAEVIUM PERTINERE. utroque autem modo, tam hoc quam illo, Titius heredem suum obligatum relinquit de fideicommisso restituendo. (278.) Praeterea legata *per* formulam petimus: fideicommissa vero Romae quidem aput Consulem vel aput eum Praetorem qui praecipue *de* fideicommissis ius dicit persequimur; in provinciis vero aput Praesidem provinciae. (279.) Item de fideicommissis semper in urbe ius

277. Likewise, although we cannot institute after the death of him who becomes our heir another heir to take his place<sup>1</sup>, yet we can ask him to deliver over to another, when he shall be dying, the inheritance wholly or in part. And since a *fideicommissum* can be given even after the death of the heir<sup>2</sup>, we can produce the same effect also if we word our bequest thus: "When Titius, my heir, shall be dead, I wish my inheritance to belong to Publius Maevius." By each of these methods, both the first and the second, Titius leaves his heir bound to deliver over a *fideicommissum*. 278. Moreover, we sue for legacies by means of a *formula*<sup>3</sup>: but we proceed for *fideicommissa*, at Rome before the Consul, or the Praetor<sup>4</sup> whose special jurisdiction is over *fideicommissa*, in the provinces before the governor. 279. Likewise, judgment is given regarding *fideicommissa* at any time in the city: but regarding

tators, to avoid the operation of the *Lex Aelia Sentia*, had probably appointed slaves under thirty, not as heirs immediately, but to be heirs when they reached the age of thirty, and this was rendered invalid by the S.C.<sup>1</sup> The S.C. therefore merely applied to a particular case the well-known maxim: "Nemo partim testatus, partim intestatus decedere potest:" for there would be an intestacy from the time of the testator's death to that when the heir became

thirty years old: or if we consider that the heir *ab intestato* might occupy during the interval, then the S.C. confutes us by the equally trite maxim: "Semel heres, semper heres."

<sup>1</sup> II. 184.

<sup>2</sup> But not a legacy: see II. 232.

<sup>3</sup> IV. 30 et seqq.

<sup>4</sup> Ulpian, XXV. 12: "Jus omne fideicommissorum non in vindicatione, sed in petitione consistet." Paulus, S. R. IV. 1. § 18.

dicitur : de legatis vero, cum res aguntur. (280.) Fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debebit : legatorum vero usurae non debentur ; idque rescripto divi Hadriani significatur. scio tamen Iuliano placuisse in eo legato quod sinendi modo relinquitur idem iuris esse quod in fideicommissis : quam sententiam et his temporibus magis optinere video. (281.) Item legata Graece scripta non valent : fideicommissa vero valent. (282.) Item si legatum per damnationem relictum heres infitietur, in duplum *cum eo* agitur : fideicommissi vero nomine semper in simplum persecutio est. (283.) Item *quod* quisque ex fideicommisso plus debito per errorem solverit, repetere potest : at id quod ex causa falsa per damnationem legati plus debito solutum sit, repeti non potest. idem scilicet iuris est de eo [legato] quod non debitum vel ex hac vel ex illa causa per errorem solutum fuerit.

284. Erant etiam aliae differentiae, quae nunc non sunt.

legacies only on days appointed for such business. 280. The interest and profits of *fideicommissa* are due, in case he who has to pay a *fideicommissum* makes delay of payment : but the interest of legacies is not due : and this is stated in a rescript of the late emperor Hadrian. I know, however, that Julianus thought the rule was the same in a legacy left *sinendi modo*<sup>1</sup> as in *fideicommissa*, and I see that this opinion prevails at the present time too. 281. Likewise, legacies written in Greek are invalid, but *fideicommissa* are valid<sup>2</sup>. 282. Likewise, if the heir deny that a legacy has been left by damnation<sup>3</sup>, the action lies against him for double : but the suit for *fideicommissa* is always for the value only. 283. Likewise, a man can reclaim what he has paid by mistake beyond what was due under a *fideicommissum* : whilst that which has for an erroneous reason been paid beyond what is due under a legacy by damnation cannot be recovered<sup>4</sup>. The same undoubtedly is the law as to a legacy which, though not due, has for some cause or other been paid by mistake<sup>5</sup>.

284. There used to be other differences ; but these do not

<sup>1</sup> II. 209.

<sup>2</sup> Ulpian, XXV. 9.

<sup>3</sup> II. 201.

<sup>4</sup> Ulpian, XXIV. 33.

<sup>5</sup> In the first case the legacy is due, but there is a payment in excess : in the second case no legacy is due, at all.

*and legacies*

(285.) Ut ecce peregrini poterant fideicommissa *capere* : et fere haec fuit origo fideicommissorum. sed postea id prohibitum est ; et nunc ex oratione divi Hadriani senatusconsultum factum est, ut ea fideicommissa fisco vindicarentur. (286.) Caelibes quoque qui per legem Iuliam hereditates legataque capere prohibentur, olim fideicommissa videbantur capere posse. Item orbi qui per legem Papiam, ob id quod liberos non habent, dimidias partes hereditatum legatorumque perdunt, olim solida fideicommissa videbantur capere posse. sed postea senatusconsulto Pegasiano perinde fideicommissa quoque, ac legata hereditatesque capere posse prohibiti sunt. eaque translata sunt ad eos qui testamento liberos habent, aut si nullus liberos habebit, ad populum, sicuti iuris est in legatis et in hereditatibus. (287.) Eadem aut simili ex causa autem olim incertae personae vel postumo alieno per fideicommissum relinqui poterat, quamvis neque heres institui neque legari ei possit. sed senatus-

now exist. 285. For instance, foreigners could take *fidei commissum*<sup>1</sup>; and this was almost the first instance of *fideicommissum*. But afterwards this was forbidden : and now a *senatusconsultum* has been enacted, at the instance of the late emperor Hadrian, that such *fideicommissa* are to be claimed for the *fiscus*. 286. Unmarried persons also, who by the Lex Julia are debarred from taking inheritances and legacies, were in olden times considered capable of taking *fideicommissum*<sup>2</sup>. Likewise, *orbi*, who by the Lex Papia lose half their inheritances and legacies because they have no children, were in olden times considered capable of taking *fideicommissum* in full. But afterwards by the *senatusconsultum Pegasianum* they were forbidden to take *fideicommissum* as well as inheritances or legacies. And these were transferred to those persons named in the testament who have children, or if none of them have children, to the *populus*, just as the rule is regarding legacies and inheritances<sup>3</sup>. 287. For the same or a similar reason, too, a *fideicommissum* could formerly be left to an uncertain person or posthumous stranger, although such an one could not be appointed either heir or legatee<sup>4</sup>. But by a *senatusconsultum* which was made at

<sup>1</sup> Cf. Val. Max. Lib. IV. c. 7.

<sup>2</sup> II. 111. Note.

<sup>3</sup> II. 206, 207.

<sup>4</sup> II. 238—241. Ulpian, XXII. 4.

consulto quod auctore divo Hadriano factum est idem in fideicommissis quod in legatis hereditatibusque constitutum est. (288.) Item poenae nomine iam non dubitatur nec per fideicommissum quidem relinqui posse. (289.) Sed quamvis in multis iuris partibus longe latior causa sit fideicommissorum, quam eorum quae directo relinquuntur, in quibusdam tantumdem valeant: tamen tutor non aliter testamento dari potest quam directo, veluti hoc modo: LIBERIS MEIS TITIUS TUTOR ESTO, vel ita: LIBERIS MEIS TITIVM TUTOREM DO: per fideicommissum vero dari non potest.

the instance of the late emperor Hadrian the same rule was established with regard to *fideicommissa* as with regard to legacies and inheritances. 288. Likewise, there is now no doubt that a bequest by way of penalty cannot be made even by *fideicommissum*. 289. But although in many points of law the scope of *fideicommissa* is far more comprehensive than that of direct bequests, and in others the two are of equal effect, yet a tutor cannot be given in a testament in any manner except directly, for instance thus: "Titius be tutor to my children:" or thus, "I give Titius as tutor to my children:" and he cannot be given by *fideicommissum*.

BOOK III.<sup>1</sup>

1. *Intestatorum hereditates lege XII tabularum primum ad suos heredes pertinent.* (2.) *Sui autem heredes existimantur liberi qui in potestate morientis fuerint, veluti filius filiarum, nepos neptis ex filio, pronepos proneptis ex nepote filio nato prognatus prognatarum, nec interest utrum naturales sint liberi, an adoptivi.*

*Ita demum tamen nepos neptis et pronepos proneptis suorum heredum numero sunt, si praecedens persona dixerit in potestate parentis esse, sive morte id acciderit sive alia ratione, veluti emancipatione: nam si per id tempus quo quis moritur filius in potestate eius sit, nepos ex eo suus heres esse non potest. idem et in ceteris*

1. THE inheritances of intestates by a law of the Twelve Tables belong in the first place to the *sui heredes*<sup>1</sup>: 2. and those descendants are accounted *sui heredes* who were in the *potestas* of the dying man, as a son or daughter, grandson or granddaughter by a son, great-grandson or great-granddaughter sprung from a grandson born from a son. Nor does it matter whether they be actual or adopted descendants.

But a grandson or granddaughter, and a great-grandson or great-granddaughter, are in the category of *sui heredes* only when the person prior to them in degree has ceased to be in the *potestas* of his ascendant, whether that has happened by death or some other means, emancipation for instance: for if at the time when a man dies his son be in his *potestas*, the grandson by him cannot be a *suus heres*<sup>2</sup>. And the same we understand to be laid

<sup>1</sup> The first four paragraphs of this book and a portion of the fifth are filled in conjecturally by the German editors of the text, as a leaf is want-

ing from the MS. at this point.

<sup>2</sup> II. 156. Ulpian, XXII. XXVI. 1.

<sup>3</sup> I. 127.



*deinceps liberorum personis dictum intelligemus. (3.) Uxor quoque quae in manu est sua heres est, quia filiae loco est; item nurus quae in filii manu est, nam et haec neptis loco est. sed ita demum erit sua heres, si filius cuius in manu erit, cum pater moritur, in potestate eius non sit. idemque dicemus et de ea quae in nepotis manu matrimonii causa sit, quia proneptis loco est. (4.) Postumi quoque, qui si vivo parente nati essent, in potestate eius futuri forent, sui heredes sunt. (5.) Idem iuris est de his quorum nomine ex lege Aelia Sentia vel ex senatusconsulto post mortem patris causa probatur: nam et hi vivo patre causa probata in potestate eius futuri essent. (6.) Quod etiam de eo filio, qui ex prima secundave mancipatione post mortem patris manumittitur, intelligemus.*

7. Igitur cum filius filiave, et ex altero filio nepotes nepesve extant, pariter ad hereditatem vocantur; nec qui gradu

down with regard to other classes of descendants. 3. A wife also who is in *manus* is a *sua heres*, because she is in the place of a daughter: likewise a daughter-in-law who is in the *manus* of a son, because she again is in the place of a granddaughter<sup>1</sup>. But she will only be a *sua heres* in case the son, in whose *manus* she is, be not in his father's *potestas* when his father dies. And the same we shall also lay down with regard to a woman who is in the *manus* of a grandson *matrimonii causa*<sup>2</sup>, because she is in the place of a great-granddaughter. 4. Posthumous children also, who, if they had been born in the lifetime of the ascendant, would have been in his *potestas*, are *sui heredes*. 5. The law is the same as to those in reference to whom cause is proved after the death of their father by virtue of the *Lex Aelia Sentia* or the *senatusconsultum*: for these too, if cause had been proved in the lifetime of the father, would have been in his *potestas*<sup>3</sup>. 6. Which rule we also apply to a son who is manumitted from a first or second mancipation after the death of his father<sup>4</sup>.

7. When therefore a son or daughter is alive, and also grandsons or granddaughters by another son, they are called simultaneously to the inheritance: nor does the nearer in

<sup>1</sup> II. 159.

<sup>2</sup> I. 114.

<sup>3</sup> I. 29 et seqq.; I. 67 et seqq.

<sup>4</sup> II. 141—143; I. 132, 135.

proximior est ulteriorem excludit: *aequum* enim videbatur nepotes neptesve in patris sui locum portionemque succedere. pari ratione et si nepos neptisve sit ex filio et ex nepote pronepos *proneptisve*, simul omnes vocantur ad hereditatem. (8.) Et quia placebat nepotes neptesve, item pronepotes proneptesve in parentis sui locum succedere: conveniens esse visum est non in capita, sed *in stirpes* hereditates dividi, ita ut filius partem dimidiam hereditatis ferat, et ex altero filio duo pluresve nepotes alteram dimidiam; item si ex duobus filiis nepotes extent, et ex altero filio unus forte vel duo, ex altero tres aut quattuor, ad unum aut ad duos dimidia pars pertineat, et ad tres aut quattuor altera dimidia.

9. Si *nullus sit* suorum heredum, tunc hereditas *pertinet* ex eadem lege XII tabularum ad agnatos. (10.) *Vocantur autem* agnati qui legitima cognatione iuncti sunt: legitima autem cognatio est ea quae per virilis sexus personas *coniungitur. ita-*

degree exclude the more remote: for it seemed fair for the grandsons or granddaughters to succeed to the place and portion of their father. On a like principle also, if there be a grandson or granddaughter by a son and a great-grandson or great-granddaughter by a grandson, they are all called simultaneously to the inheritance. 8. And since it seemed good that grandsons and granddaughters, as also great-grandsons and great-granddaughters, should succeed into the place of their ascendant: therefore it appeared consistent that the inheritance should be divided not *per capita* but *per stirpes*, so that a son should receive one-half of the inheritance, and two or more grandsons by another son the other half: also that if there were grandsons by two sons, and from one son one or two perhaps, from the other three or four, one-half should belong to the one or two and the other half to the three or four.

9. If there be no *suus heres*, then the inheritance by the same law of the Twelve Tables belongs to the agnates<sup>1</sup>. 10. Now those are called agnates who are united by a relationship recognized by the law; and a relationship recognized by the law is one traced through persons of the male sex. Brothers

<sup>1</sup> I. 156. Tabula v. l. 4: "Si nec escit, adgnatus proximus familiam ab intestato moritur cui suus heres habeto."

*que eodem patre nati fratres agnati sibi sunt, qui etiam consanguinei vocantur, nec requiritur an etiam matrem eandem habuerint. item patruus fratris filio et invicem is illi agnatus est. eodem numero sunt fratres patruales inter se, id est qui ex duobus fratribus progenerati sunt, quos plerique etiam consobrinos vocant. qua ratione scilicet etiam ad plures gradus agnationis pervenire poterimus. (11.) Non tamen omnibus simul agnatis dat lex XII tabularum hereditatem, sed his qui tunc, cum certum est aliquem intestato decessisse, proximo gradu sunt. (12.) Nec in eo iure successio est: ideoque si agnatus proximus hereditatem omiserit, vel antequam adierit, decesserit, sequentibus nihil iuris ex lege competit. (13.) Ideo autem non mortis tempore quis proximus sit requirimus, sed eo tempore quo certum fuerit aliquem intestatum decessisse, quia si quis testamento facto decesserit, melius esse visum est tunc ex iis requiri proximum, cum certum esse coeperit neminem ex eo testamento fore heredem.*

therefore born from the same father are agnates one to another (and are also called *consanguinei*); nor is it a matter of inquiry whether they have the same mother as well. Likewise, a father's brother is agnate to his brother's son, and conversely the latter to the former. In the same category, one relatively to the other, are *fratres patruales*, i.e. the sons of two brothers, who are usually called *consobrini*. And on this principle evidently we may trace out further degrees of agnation. 11. But the law of the Twelve Tables does not give the inheritance to all the agnates simultaneously, but to those who are in the nearest degree at the time when it is ascertained that a man has died intestate. 12. Under this title too there is no succession<sup>1</sup>; and therefore, if the agnate of nearest degree decline the inheritance, or die before he has entered, no right accrues under the law to those of the next degree. 13. And the reason why we inquire who is nearest in degree not at the time of death but at the time when it was ascertained that a man had died intestate, is that if the man died after making a testament, it seemed the better plan for the nearest agnate to be sought for when it became certain that no one would be heir under that testament.

<sup>1</sup> III. 22. Ulpian, XXVI. 5.

### *Consanguineae.*

14. Quod ad feminas tamen attinet, in hoc iure aliud in ipsarum hereditatibus capiendis placuit, aliud in ceterorum bonis ab his capiendis. nam feminarum *hereditates* perinde ad nos agnationis iure redeunt atque masculorum: nostrae vero hereditates ad feminas ultra consanguineorum gradum non pertinent. itaque soror fratri sororive legitima heres est; amita vero et fratris filia legitima heres esse *non potest*. sororis autem nobis loco est etiam mater aut noverca quae *per in manum* conventionem aput patrem nostrum iura filiae consecuta est.

15. Si ei qui defunctus erit *sit* frater et alterius fratris filius, sicut ex superioribus intellegitur, frater prior est, quia gradu praecedit. sed alia facta est iuris interpretatio inter suos heredes. (16.) Quodsi defuncti nullus frater extet, *sed* sint liberi fratrum, ad omnes quidem hereditas pertinet: sed quaesitum est, si dispari forte numero sint nati, ut ex uno unus vel duo, ex altero tres vel quattuor, utrum in stirpes dividenda sit hereditas, sicut

14. With reference to women, however, one rule has been established in this matter of law as to the taking of their inheritances, another as to the taking of goods of others by them. For the inheritances of women devolve on us by right of agnation, equally with those of males: but our inheritances do not belong to women who are beyond the degree of *consanguineae*<sup>1</sup>. A sister therefore is legitimate heir to a brother or a sister: but a father's sister and a brother's daughter cannot be legitimate heirs. A mother, however, or a stepmother, who by *conventio in manum*<sup>2</sup> has gained the rights of daughter in regard to our father, stands in the place of sister to us.

15. If the deceased have a brother and a son of another brother, the brother has the prior claim, as is obvious from what we have said above<sup>3</sup>, because he is nearer in degree. But a different interpretation of the law is made in the case of *sui heredes*<sup>4</sup>. 16. Next, if there be no brother of the deceased, but there be children of brothers, the inheritance belongs to all of them: but it was doubted formerly, supposing the children were unequal in number, so that there were one or two, perhaps, from one brother, and three or four from the other, whether the

<sup>1</sup> III. 10.

<sup>2</sup> I. 108, 115 b.

<sup>3</sup> III. 11.

<sup>4</sup> III. 7.

## *Gentiles.*

inter suos heredes iuris est an potius in capita. iamdudum tamen placuit in capita dividendam esse hereditatem. itaque quotquot erunt ab utraque parte personae, in tot portiones hereditas dividetur, ita ut singuli singulas portiones ferant.

17. Si nullus agnatus sit, eadem lex XII tabularum gentiles ad hereditatem vocat. qui sint autem gentiles, primo commentario rettulimus. et cum illic admonuerimus totum gentilicium ius in desuetudinem abisse, supervacuum est hoc quoque loco de ea re curiosius tractare.

18. Hactenus lege XII tabularum finitae sunt intestatorum hereditates: quod ius quemadmodum strictum fuerit, palam est intelligere. (19.) Statim enim emancipati liberi nullum ius in hereditatem parentis ex ea lege habent, cum desierint sui

inheritance should be divided *per stirpes*, as is the rule amongst *sui heredes*<sup>1</sup>, or rather *per capita*. It has, however, for some time been decided that the inheritance must be divided *per capita*. Therefore, whatever be the number of persons in the two branches together, the inheritance is divided into that number of portions, so that each one takes a single share.

17. If there be no agnate, the same law of the Twelve Tables calls to the inheritance the *gentiles*<sup>2</sup>: and who the *gentiles* are we have informed you in the first Commentary. And since we told you there that the whole of the laws relating to *gentiles* had gone into disuse, it is superfluous to treat in detail of the matter here.

18. Thus far the inheritances of intestates are limited by the law of the Twelve Tables: and how strict these regulations were is clearly to be seen. 19. For in the first place, emancipated descendants have, according to this law, no right to the inheritance of their ascendant, since they have ceased to be *sui*

<sup>1</sup> Tab. V. l. 5, "Si adgnatus nec escit, gentilis familiam nancitor." The explanation referred to is not now extant; it was contained on the page of the MS. missing between §§ 164 and 165 of the first commentary. The subject being one of merely antiquarian interest, it will perhaps be sufficient to quote the following passage from Cicero, *Topic.* 6: "Gentiles sunt, qui inter se

eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc: Qui capite non sunt diminuti. Hoc fortasse satis est." Festus also says: "Gentilis dicitur et ex eodem genere ortus, et is qui simili nomine appellatur, ut ait Cincius: Gentiles mihi sunt qui meo nomine appellantur."

heredes esse. (20.) Idem iuris est, si ideo liberi non sint in potestate patris, quia sint cum eo civitate Romana donati, nec ab Imperatore in potestatem redacti fuerint. (21.) Item agnati capite deminuti non admittuntur ex ea lege ad hereditatem, quia nomen agnationis capitis deminutione perimitur. (22.) Item proximo agnato non adeunte hereditatem, nihilo magis sequens iure legitimo admittitur. (23.) Item feminae agnatæ quaecumque consanguineorum gradum excedunt, nihil iuris ex lege habent. (24.) Similiter non admittuntur cognati qui per feminini sexus personas necessitudine iunguntur; adeo quidem, ut nec inter matrem et filium filiamve ultro citroque hereditatis capiendae ius conpetat, praeter quam si per in manum conventionem consanguinitatis iura inter eos constiterint.

25. Sed hae iuris iniquitates edicto Praetoris emendatae sunt. (26.) nam *liberos* omnes qui legitimo iure deficiuntur vocat ad hereditatem proinde ac si in potestate parentum mortis tempore

*heredes.* 20. 'The rule is the same if children be not in the *potestas* of their father, because they have been presented with Roman citizenship at the same time with him, and have not been placed under his *potestas* by the emperor'. 21. Likewise, agnates who have suffered *capitis diminutio* are not admitted to the inheritance under this law, because the (very) name of agnation is destroyed by *capitis diminutio*<sup>1</sup>. 22. Likewise, when the nearest agnate does not enter on the inheritance, the next in degree is not on that account admitted, according to statute law<sup>2</sup>. 23. Likewise, female agnates who are beyond the degree of *consanguineae* have no title under this law<sup>3</sup>. 24. So also cognates, who are joined in relationship through persons of the female sex, are not admitted: so that not even between a mother and her son or daughter is there any right of taking an inheritance devolving either the one way or the other<sup>4</sup>, unless by means of a *conventio in manum* the rights of consanguinity have been established between them<sup>5</sup>.

25. But by the Praetor's edict these defects from equity in the rule have been corrected. 26. For he calls to the inheritance all descendants who are deficient in statutable title, just

<sup>1</sup> I. 94.

<sup>2</sup> I. 158.

daughter), nor the son's (or daughter's) by the mother.

<sup>3</sup> III. 12.

<sup>4</sup> III. 14.

<sup>5</sup> III. 14.

<sup>5</sup> Viz. neither can the mother's inheritance be taken by the son (or

fuissent, sive soli sint sive etiam sui heredes, id est qui in potestate patris fuerunt, concurrant. (27.) Agnatos autem capite deminutos non secundo gradu post suos heredes vocat, id est non eo gradu vocat quo per legem vocarentur, si capite minuti non essent; sed tertio, proximitatis nomine: licet enim capitis deminutione ius legitimum perdiderint, certe cognationis iura retinent. itaque si quis alius sit qui integrum ius agnationis habebit, is potior erit, etiam si longiore gradu fuerit. (28.) Idem iuris est, ut quidam putant, in eius agnati persona, qui proximo agnato omittente hereditatem, nihilo magis iure legitimo admittitur. sed sunt qui putant hunc eodem gradu a Praetore vocari, quo etiam per legem agnatis hereditas datur. (29.) Feminae

as though they had been in the *potestas* of their ascendants at the time of their death, whether they be the sole claimants, or whether *sui heredes* also, *i.e.* those who were in the *potestas* of their father, claim with them. 27. Agnates, however, who have suffered *capitis diminutio* he does not call in the next degree after the *sui heredes*, *i.e.* he does not call them in that degree in which they would have been called by the law if they had not suffered *capitis diminutio*; but in a third degree, on the ground of nearness of blood: for although by the *capitis diminutio* they have lost their statutable right, they surely retain the rights of cognation<sup>1</sup>. If, therefore, there be another person who has the right of agnation unimpaired, he will have a prior claim, even though he be in a more remote degree. 28. The rule is the same<sup>2</sup>, as some think, in the case of an agnate, who, when the nearest agnate declines the inheritance, is not on that account admitted by statute law. But there are some who think that such a man is called by the Praetor in the same degree as that in which the inheritance is given by the law<sup>3</sup> to the agnates.

<sup>1</sup> "Quia civilis ratio civilia quidem jura corrumpere potest, naturalia vero non potest." 1. 158.

<sup>2</sup> That is, such a person is called in the third, not the second degree. The question here discussed is a very important one. If the agnate referred to took as one of the third class, he would take concurrently with cognates; whereas if he took in the second class he would have the

whole inheritance to the exclusion of the cognates. Further, if the agnate were thrown, in the case supposed, into the third class, he might after all get nothing from the inheritance, for instance he might be related to the deceased in the third degree of blood, and so be excluded by cognates who were of the first or second.

<sup>3</sup> Sc. Tab. v. l. 4.



certe agnatae quae consanguineorum gradum excedunt tertio gradu vocantur, id est si neque suus heres neque agnatus ullus erit. (30.) Eodem gradu vocantur etiam eae personae quae per feminini sexus personas copulatae sunt. (31.) Liberi quoque qui in adoptiva familia sunt ad naturalium parentum hereditatem hoc eodem gradu vocantur.

32. Quos autem Praetor vocat ad hereditatem, hi heredes ipso quidem iure non *fiunt*. *nam* Praetor heredes facere non potest: *per legem enim tantum vel similem iuris constitutionem heredes fiunt, veluti per senatusconsultum et constitutionem principalem*: sed *eis si quidem* Praetor det bonorum possessionem, loco heredum constituuntur.

33. *Adhuc autem alios etiam complures gradus Praetor facit in bonorum possessione danda, dum id agit, ne quis sine successore moriatur.* de quibus in his commentariis copiose non agimus ideo, quia hoc ius totum propriis commentariis quoque alias explicavimus. *Hoc solum admonuisse sufficit* [*desunt lin. 36*]. (34.)

29. Female agnates who are beyond the degree of *consanguineae* are undoubtedly called in the third degree, *i.e.* when there is no *suius heres* or agnate. 30. In the same class are called those persons also who are joined in relationship through persons of the female sex. 31. Descendants also who are in an adoptive family are called in the same degree to the inheritances of their actual ascendants.

32. Now those whom the Praetor calls to the inheritance do not become heirs in strictness of law: for the Praetor cannot make heirs, as heirs exist only by a *lex* or some analogous constitution of law, for instance by a *senatusconsultum* or constitution of the emperor: but if the Praetor grant to them possession of the goods, they are put into the position of heirs.

33. The Praetor further makes many other degrees in the giving of possession of the goods, whilst providing that no one shall die without a successor. Concerning which degrees we do not treat at length in this work, because we have explained all this branch of law elsewhere in a work devoted to the subject. It is sufficient to make this statement only<sup>1</sup> . . . . .

<sup>1</sup> At this point several lines of the MS. are illegible; but the substance of the missing portion can be gathered from Ulpian, Title xxviii.



— *item ab intestato* heredes suos et agnatos ad bonorum possessionem vocat. quibus casibus beneficium eius in eo solo videtur aliquam utilitatem *habere, quod* is qui ita bonorum possessionem *petit*, interdicto cuius principium est QUORUM BONORUM uti possit. cuius interdicti quae sit utilitas, suo loco proponemus. alioquin remota quoque bonorum possessione ad eos hereditas pertinet iure civili.

34. . . . likewise he calls the *sui* and *agnati*, who are heirs on an intestacy, to the possession of the goods. In which cases his grant appears to bestow an advantage only in this respect, that a man who thus sues for possession of the goods can make use of the interdict commencing with the words: *Quorum Bonorum*<sup>1</sup>. What is the advantage of this interdict we shall explain in its proper place. As to all other incidents, even if the possession of the goods were left out of question, the inheritance belongs to them by the civil law.

*Bonorum possessio* is either *contra tabulas testamenti*, or *secundum tabulas testamenti*, or *ab intestato*.

The reason why heirs entitled at the civil law took advantage of the second-named *possessio* is given in § 34.

The same *possessio* was also granted in certain cases to those who could not claim according to strict

law. See Ulpian, XXVIII. 6. Gaius, II. 119.

The *possessiones contra tabulas*, or a considerable number of them, have been named already by Gaius, and a résumé of them is also to be found in Ulpian, XXVIII. 2—4.

The *possessiones ab intestato* are enumerated in Ulpian, XXVIII. 7.

It may be useful to contrast the Praetorian system of succession with that of the Twelve Tables.

TWELVE TABLES.	PRAETOR'S EDICT.
I. Sui heredes.	I. (a) Sui heredes. b) Emancipated children. (B. P. "unde liberi").
II. Agnati et consanguineae.	II. Agnati et consanguineae. (B. P. "unde legitimi").
III. Gentiles.	III. (a) Agnati capite deminuti. § 27. Agnatae. § 29. Agnati successores. § 28. Liberi in adoptivâ familiâ. § 31. (c) Cognati. § 30. (B. P. "unde cognati," or "proximitatis" -----)

*Bonorum Possessio sine re, cum re.*

35. Ceterum saepe quibusdam ita datur bonorum possessio, ut is cui data sit, *non* optineat hereditatem : quae bonorum possessio dicitur sine re. (36.) nam si verbi gratia iure facto testamento heres institutus creverit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo, quod iure civili heres sit, nihilo minus ii qui nullo facto testamento ad intestati bona vocantur possunt petere bonorum possessionem : sed sine re ad eos hereditas pertinet, cum testamento scriptus heres erincere hereditatem possit. (37.) Idem iuris est, si intestato aliquo mortuo suus heres noluerit petere bonorum possessionem, contentus legitimo iure. nam et agnato competit quidem bonorum possessio, sed sine re, cum evinci hereditas ab suo herede potest. et illud convenienter, si ad agnatum iure civili pertinet hereditas et hic adierit hereditatem, sed bonorum possessionem petere noluerit, et si quis ex

35. But frequently the possession of the goods is granted to people in such a manner, that he to whom it is given does not obtain the inheritance ; which possession of the goods is said to be *sine re* (without benefit)<sup>1</sup>. 36. For, to take an example, if the heir instituted in a testament legally executed have made cession for the inheritance<sup>2</sup>, but have not cared to sue for possession of the goods "in accordance with the tablets," content with the fact that he is heir at the civil law, those, nevertheless, who are called to the goods of the intestate in case no testament be made, can sue for the possession of the goods : but the inheritance belongs to them *sine re*, since the written heir can wrest the inheritance from them<sup>3</sup>. 37. The law is the same, if, when a person has died intestate, his *suius heres* do not care to sue for the possession of the goods, being content with his statutable right. For then the possession of the goods belongs to the agnate, but *sine re*, since the inheritance can be wrested away from him by the *suius heres*. And in accordance with this, if the inheritance belong to the agnate by the civil law, and he enter upon it, but do not care to sue for possession of the goods, and if one of the cognates of nearest degree sue for it,

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<sup>1</sup> II. 148. Ulpian, XXVIII. 13; and the *hereditas* remains with the written heir, *cum re*. But Gaius is XXIII. 6.

<sup>2</sup> II. 164.

<sup>3</sup> More correctly the *bonorum possessiones* belongs to them, but is *sine re*, here using *hereditas* to signify "the hereditaments," rather than "the inheritance."

proximis cognatus petierit, sine re habebit bonorum possessionem propter eandem rationem. (38.) Sunt et alii quidam similes casus, quorum aliquos superiore commentario tradidimus.

39. Nunc de libertorum bonis videamus. (40.) Olim itaque licebat liberto patronum suum in testamento praeterire: nam ita demum lex XII tabularum ad hereditatem liberti vocabat patronum, si intestatus mortuus esset libertus nullo suo herede relicto. itaque intestato quoque mortuo liberto, si is suum heredem reliquerat, nihil in bonis eius patrono iuris erat. et si quidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla videbatur esse querela; si vero vel adoptivus filius filiave, vel uxor quae in manu esset sua heres esset, aperte iniquum erat nihil iuris patrono superesse. (41.) Qua de causa postea Praetoris edicto haec iuris iniquitas emendata est. sive enim faciat testamentum libertus, iubetur ita testari, ut patrono suo partem dimidiam bonorum suorum relinquat; et si aut nihil aut minus quam partem dimidiam reliquerit, datur patrono

he will for the same reason have possession of the goods *sine re*. 38. There are certain other similar cases, some of which we have treated of in the preceding book<sup>1</sup>.

39. Now let us consider about the goods of freedmen<sup>2</sup>. 40. Formerly then a freedman might pass over his patron in his testament: for a law of the 'Twelve Tables'<sup>3</sup> called the patron to the inheritance of a freedman, only if the freedman had died intestate and leaving no *suius heres*. Therefore, even when a freedman died intestate, if he left a *suius heres*, his patron had no claim to his goods. And if indeed the *suius heres* he left were one of his own actual children, there seemed to be no ground for complaint, but if the *suius heres* were an adopted son or daughter, or a wife in *manus*, it was clearly inequitable that no right should survive to the patron. 41. Wherefore this defect from equity in the law was afterwards corrected by the Praetor's edict. For if a freedman make a testament, he is ordered to make it in such manner as to leave his patron the half of his goods: and if he have left him either nothing or less than the half, possession of one-half of the goods is given to the patron "against the tablets of the

<sup>1</sup> II. 119, 148, 149.

<sup>2</sup> Ulpian, XXVII. XXIX.

<sup>3</sup> Tab. v. l. 8.

contra tabulas testamenti partis dimidiaie bonorum possessio. si vero intestatus moriatur, suo herede relicto adoptivo filio, *vel* uxore quae in manu ipsius esset, vel nuru quae in manu filii eius fuerit, datur aequè patrono adversus hos suos heredes partis dimidiaie bonorum possessio. prosunt autem liberto ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet, sed etiam emancipati et in adoptionem dati, *si* modo aliqua ex parte heredes scripti *sint*, aut *praeteriti* contra tabulas testamenti bonorum possessionem ex edicto petierint: nam exheredati nullo modo repellunt patronum. (42.) Postea lege Papia aucta sunt iura patronorum quod ad locupletiores libertos pertinet. Cautum est enim ea lege, ut ex bonis eius qui sestertiorum *nummorum centum milium plurisve* patrimonium reliquerit, et pauciores quam tres liberos habeat, sive is testamento facto sive intestato mortuus erit, virilis pars patrono debeatur. itaque cum unum filium unamve filiam heredem reliquerit libertus, perinde pars dimidia patrono debetur, *ac si* sine ullo filio filiave moreretur; cum vero *duos*

testament." But if he die intestate, leaving as *suus heres* an adopted son, or a wife who was in his own *manus*, or a daughter-in-law who was in the *manus* of his son, possession of half the goods is still given to the patron as against these *sui heredes*. But all actual descendants avail the freedman to exclude his patron, not only those whom he has in his *potestas* at the time of death, but also those emancipated or given in adoption, provided only they be appointed heirs to some portion, or, being passed over, sue for possession of the goods "against the tablets of the testament" in accordance with the edict: for when disinherited they in no way bar the patron. 42. Afterwards by the Lex Papia<sup>1</sup> the rights of patrons in regard to wealthy freedmen were increased. For it has been provided by that law that a proportionate share shall be due to the patron out of the goods of a freedman who leaves a patrimony of the value of 100,000 sesterces or more, and has fewer than three children, whether he die with a testament or intestate. When, therefore, the freedman leaves as heir one son or one daughter, a half is due to the patron, just as though he died without any son or daughter: but

<sup>1</sup> A.D. 4. See note on IL 111.

duasve heredes reliquerit, tertia pars debetur; si tres relinquat, repellitur patronus. [*linea vacua.*]

43. In bonis libertinarum nullam iniuriam antiquo iure patiebantur patroni. cum enim hae in patronorum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. itaque sive auctor ad testamentum faciendum factus erat, neque tantum, quantum vellet, testamento sibi relictum

<sup>1</sup>, de se queri debebat, qui id a liberta impetrare potuerat. si

auctor ei factus non erat, etiam tutius hereditatem morte eius capiebat; nam neque suum heredem liberta relinquebat qui posset patronum a bonis eius vindicandis repellere. (44.) Sed postea lex Papia cum quattuor liberorum iure libertinas tutela patronorum liberaret, et eo modo inferret, ut iam sine patroni tutoris auctoritate testari possent, prospexit, ut pro numero liberorum quos superstites liberta habuerit virilis pars patrono debeatur — ex bonis eius, quae omnia — — — iuris [2 lin.] ad patronum pertinet.

when he leaves two heirs, male or female, a third part is due: when he leaves three the patron is excluded.

43. As to the goods of freedwomen, the patrons suffered no wrong under the ancient law. For since these women were under the *tutela legitima* of their patrons, they obviously could not make a testament except with the authorization of the patron<sup>1</sup>. Therefore, if he had lent his authorization to the making of a testament, and that amount which he wished for had not been left to him, he had himself to blame, since he could have obtained this from the freedwoman. But if he had not lent her his authority, he took the inheritance even more surely on her death: since a freedwoman could not leave a *suus heres* to exclude the patron from his claim upon her goods<sup>2</sup>. 44. But afterwards, when the Lex Papia had exempted freedwomen from the *tutela* of their patrons by prerogative of four children<sup>3</sup>, and so had empowered them thenceforth to make a testament without the authorization of their patron, it provided that a proportionate share should be due to the patron, determined by the number of children whom the freedwoman had surviving.....

<sup>1</sup> II. 118, 122.

<sup>2</sup> Ulpian, XXIX. 2.

<sup>3</sup> I. 194. Ulpian, XXIX. 3.

*Claims of a Patron's sons and daughters.*

45. *Quae autem diximus de patrono, eadem intelligemus et item de nepote ex filio, et de pronepote*

(46.) *Filia vero patroni, item et proneptis ex nepote filio nato pregnata, quamvis habeant, quod lege XII tabularum patrono datum est, tamen vocat tantum masculini sexus patronorum liberos: sed filia, ut contra tabulas testamenti liberti vel ab intestato contra filium adoptivum vel uxorem nuptumve dimidia pars bonorum possessionem petat, trium liberorum iure lege Papia consequitur: aliter hoc ius non habet.* (47.) *Sed ut ex bonis libertae suae quattuor liberos habentis virilis pars ei deberetur, liberorum quidem iure non est comprehensum, ut quidam putant. sed tamen intestata liberta mortua, verba legis Papiae faciunt, ut ei virilis pars debeatur. si vero testamento facto mortua sit liberta, tale ius ei datur, quale datum est patronae tribus liberis honoratae, ut proinde bonorum possessionem habeat*

45. All that we have said regarding a patron, we shall apply also to the son of a patron, to his grandson by a son, and to his great-grandson sprung from a grandson born from a son<sup>1</sup>. 46. But although the daughter of a patron, and his granddaughter by a son, and his great granddaughter sprung from a grandson born from a son have the same right which is given to the patron himself by the law of the Twelve Tables, yet the Praetor only calls in male descendants of the patron: but by prerogative of three children the daughter, according to the Lex Papia, obtains (the privilege) of suing for possession of half the goods "against the tablets of the testament" of a freedman, or on his intestacy, in opposition to his adopted son, or wife, or daughter-in-law: in other cases she has not this right. 47. But, as some think, it is not a consequence of this prerogative of children (of the patron's daughter) that a proportionate share should be due to her out of the goods of her freedwoman who has four children. Still, however, if the freedwoman die intestate, the words of the Lex Papia are express that she shall have a proportionate share. But if the freedwoman die leaving a testament, a right is given to the patron's daughter similar to that given to a patroness having the prerogative of three children, viz. that she shall have the possession of the goods, just as the patron and

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<sup>1</sup> Ulpian, XXIX. 4.

*quam patronus liberique contra tabulas testamenti liberti habent : quamvis parum diligenter ea pars legis scripta sit. (48.) Ex his apparet extraneos heredes patronorum longe remotum ab omni eo iure iri, quod vel in intestatorum bonis vel contra tabulas testamenti patrono competit.*

49. Patronae olim ante legem Papiam hoc solum ius habebant in bonis libertorum, quod etiam patronis ex lege XII tabularum datum est. nec enim ut contra tabulas testamenti, in quo praeteritae erant, vel ab intestato contra filium adoptivum vel uxorem nurumve bonorum possessionem partis dimiduae peterent, Praetor similiter ut patrono liberisque eius concessit. (50.) Sed postea lex Papia duobus liberis honoratae ingenuae patronae, libertinae tribus, eadem fere iura dedit quae ex edicto Praetoris patroni habent. trium vero liberorum iure honoratae ingenuae patronae ea iura dedit quae per eandem legem pa-

his descendants have, "against the tablets of the testament:" although this portion of the *lex* is not very carefully worded<sup>1</sup>. 48. From the foregoing it appears that extraneous heirs<sup>2</sup> of a patron are to be completely debarred from the whole of the right which appertains to the patron either in respect of the goods of intestates or "against the tablets of a testament."

49. Patronesses in olden times, before the Lex Papia was passed, had only that claim upon the goods of freedmen, which was granted to patrons also by the law of the Twelve Tables. For the Praetor did not grant to them, as he did to a patron and his descendants, the right of suing for possession of half the goods "against the tablets of a testament" in which they were passed over, or against an adopted son, or a wife, or a daughter in law in a case of intestacy. 50. But afterwards the Lex Papia conferred on a freeborn patroness having two children, or a freedwoman patroness having three, almost the same rights which patrons have by the Praetor's edict<sup>3</sup>. Whilst to a freeborn patroness having the prerogative of three chil-

<sup>1</sup> Paragraphs 46, 47 are filled in conjecturally by Gneist and others: whether correctly or not seems doubtful: at any rate the style of the Latin is very different from that generally employed by Gaius. For the matter contained in these two paragraphs see Ulpian, XXIX. 5.  
<sup>2</sup> II. 161.  
<sup>3</sup> Ulpian, XXIX. 6, 7.

*Claims of a Patroness on the goods of a Freedwoman.*

trono data sunt: libertinae autem patronae non idem iuris praestitit. (51.) Quod autem ad libertinarum bona pertinet, si quidem intestatae decesserint, nihil novi patronae liberis honoratae lex Papia praestat. itaque si neque ipsa patrona, neque liberta *capite diminuta* sit, ex lege XII tabularum ad eam hereditas pertinet, et excluduntur libertae liberi; quod iuris est etiamsi liberis honorata non sit patrona: numquam enim, sicut supra diximus, feminae suum heredem habere possunt. si vero vel huius vel illius capitis diminutio interveniat, rursus liberi libertae excludunt patronam. quia legitimo iure *capitis diminutione* perempto evenit, ut liberi libertae cognationis iure potiores habeantur. (52.) Cum autem testamento facto moritur liberta, ea quidem patrona quae liberis honorata non est nihil iuris habet contra libertae testamentum: ei vero quae liberis honorata sit, hoc ius tribuitur per legem Papiam quod habet ex edicto patronus contra tabulas liberti.

dren it gave the very rights which are given by that same law to a patron<sup>1</sup>, although it did not give the same privilege to a freedwoman patroness. 51. But with respect to the goods of freedwomen, if they die intestate, the Lex Papia gives no new privilege to a patroness having children. If, therefore, neither the patroness herself, nor the freedwoman have suffered *capitis diminutio*, the inheritance belongs to the former by the law of the Twelve Tables, and the children of the freedwoman are excluded: which is the rule even if the patroness have no children: for, as we have said above, women can never have a *suus heres*<sup>2</sup>. But if the *capitis diminutio* of either the one or the other have taken place, the children of the freedwoman in their turn exclude the patroness. Because, when the statutable right has been destroyed by the *capitis diminutio*, the result is that the children of the freedwoman are considered to have the stronger claim by right of relationship. 52. But when a freedwoman dies after making a testament, a patroness who has no children has no right against her testament: but to one who has children the same right is granted by the Lex Papia, as that which a patron has by the Praetor's edict against the testament of a freedman.

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<sup>1</sup> III. 42.

<sup>2</sup> II. 161.



### *Latini Iuniani.*

53. Eadem lex patronae filiae liberis honoratae — patroni iura dedit; sed in huius persona etiam unius filii filiaeve ius sufficit.

54. Hactenus omnia *ea* iura quasi per indicem tetigisse satis est: alioquin diligentior interpretatio propriis commentariis exposita est.

55. Sequitur ut de bonis Latinorum libertinorum dispiciamus.

56. Quae pars iuris ut manifestior fiat, admonendi sumus, de quo alio loco diximus, eos qui nunc Latini Iuniani dicuntur olim ex iure Quiritium servos fuisse, sed auxilio Praetoris in libertatis forma servari solitos; unde etiam res eorum peculii iure ad patronos pertinere solita est: postea vero per legem Iuniam eos omnes quos Praetor in libertatem tuebatur liberos esse coepisse et appellatos esse Latinos Iunianos: Latinos ideo, quia lex eos liberos perinde esse voluit, atque si essent cives Romani ingenui qui ex urbe Roma in Latinas colonias deducti Latini coloniarii esse coeperunt: Iunianos ideo, quia per legem

53. The same law grants to the daughter of a patroness who has children the rights belonging to a patron: but in her case the prerogative of even one son or daughter is sufficient.

54. It is enough to have touched on all these rights to this extent, in outline as it were: a more accurate exposition is elsewhere set forth in a book specially devoted to them.

55. Our next task is to consider the case of the goods of freedmen who are Latins.

56. To make this part of the law more intelligible, we must be reminded of what we said in another place<sup>1</sup>, that those who are now called Junian Latins, were formerly slaves *ex iure Quiritium*, but by the Praetor's help used to be secured in the semblance of freedom: and so their property used to belong to their patrons by the title of *peculium*: but that afterwards, in consequence of the Lex Junia, all those whom the Praetor protected as if free, began to be really free, and were called Junian Latins: Latins, for the reason that the law wished them to be free, just as though they had been free-born Roman citizens, who had been led out from the city of Rome into Latin colonies, and become Latin colonists; Junians, for the

Iuniam liberi facti sunt, etiamsi non cives Romani. *quare legis Iuniae lator, cum intelligeret futurum, ut ea fictione res Latinorum defunctorum ad patronos pertinere desinerent, ob id quod neque ut servi decederent, ut possent iure peculii res eorum ad patronos pertinere, neque liberti Latini hominis bona possent manumissionis iure ad patronos pertinere, necessarium existimavit, ne beneficium istis datum in iniuriam patronorum converteretur, cavere, ut bona horum libertorum proinde ad manumissores pertinerent, ac si lex lata non esset. itaque iure quodammodo peculii bona Latinorum ad manumissores eorum pertinent.* (57.) *Unde evenit, ut multum differant ea iura quae in bonis Latinorum ex lege Iunia constituta sunt, ab his quae in hereditate civium Romanorum libertorum observantur.* (58.)

reason that they were made free by the Junian Law, though not made Roman citizens. Wherefore, when he who carried the Lex Junia saw that the result of this fiction would be that the goods of deceased Latins would cease to belong to their patrons, because neither would they die as slaves, so that their property could belong to their patrons by the title of *peculium*, nor could the goods of a Latin freedman belong to the patrons by the title of manumission<sup>1</sup>, he thought it necessary, in order to prevent the benefit bestowed on these persons from proving an injury to their patrons, to insert a proviso, that the goods of such freedmen should belong to their manumittors in like manner as if the law had not been passed. Therefore, the goods of Latins belong to their manumittor, by a title something like that of *peculium*. 57. The result of this is that the rules applied to the goods of Latins by the Lex Junia are very different from those which are observed in reference to the inheritance of freedmen who are Roman citizens. 58. For the inheritance

<sup>1</sup> The *legitima hereditas* of patrons, being derived from the Law of the Twelve Tables, which did not recognize any title but that *ex jure Quiritium*, could not apply to Latins, who were manumitted by owners having only the title *in bonis*. Neither could it apply to slaves manumitted irregularly and so made Latins, for the Twelve Tables again recognized no manumission but one in due form of

law, i. e. by *vindicta*, *census* or testament. If the *Lex Aelia Sentia* had not been passed, there might perhaps have been a *legitima hereditas* of the goods of freedmen manumitted when under thirty years of age, but as that *lex* had forbidden such freedmen to be *cives Romani*, except in special cases, here again the rules of the Twelve Tables were inadmissible. See l. 17.

Nam civis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinet: ad filium autem patroni nepotesque ex filio et pronepotes ex nepote *filio nato prognatos* omnimodo pertinet, etiamsi a parente fuerint exheredati: Latinorum autem bona tamquam peculia servorum etiam ad extraneos heredes pertinent, et ad liberos manumissoris exheredatos non pertinent. (59.) Item civis Romani liberti hereditas ad duos pluresve patronos aequaliter pertinet, licet dispar in eo servo dominium habuerint: bona vero Latinorum pro ea parte pertinent pro qua parte quisque eorum dominus fuerit. (60.) Item in hereditate civis Romani liberti patronus alterius patroni filium excludit, et filius patroni alterius patroni nepotem repellit: bona autem Latinorum et ad ipsum patronum et ad alterius patroni heredem simul pertinent quo qua parte ad ipsum manumissorem pertinerent. (61.) Item si unius patroni tres forte liberi sunt, et alterius unus, hereditas civis Romani liberti in capita dividitur, id est tres fratres tres portiones

of a freedman who is a Roman citizen in no case belongs to the extraneous heirs of his patron<sup>1</sup>: but belongs in all cases to the son of the patron, to his grandsons by a son, and to his great-grandsons sprung from a grandson born from a son, even though they have been disinherited by their ascendant: whilst the goods of Latins belong, like the *peculia* of slaves, even to the extraneous heirs, and do not belong to the disinherited descendants of the manumittor. 59. Likewise, the inheritance of a freedman who is a Roman citizen belongs equally to two or more patrons, although they had unequal shares of property in him as a slave: but the goods of Latins belong to them according to the proportion in which each was owner. 60. Likewise, in the case of an inheritance of a freedman who was a Roman citizen, one patron excludes the son of another patron: and the son of one patron excludes the grandson of another patron<sup>2</sup>: but the goods of Latins belong to a patron himself and the heir of another patron conjointly, according to the proportion in which they would have belonged to the deceased manumittor himself. 61. Again, if, for instance, there be three descendants of one patron, and one of the other, the inheritance of a freedman who is a Roman citizen is divided *per capita*<sup>3</sup>, i. e. the

<sup>1</sup> III. 45, 48.<sup>2</sup> Ulpian, xxvii. 2, 3.<sup>3</sup> Ibid. xxvii. 4.

ferunt et unus quartam : bona vero Latinorum pro ea parte ad successores pertinent pro qua parte ad ipsum manumissorem pertinerent. (62.) Item si alter ex iis patronis suam partem in hereditatem civis Romani liberti spernat, vel ante moriatur quam cernat, tota hereditas ad alterum pertinet : bona autem Latini pro parte decedentis patroni caduca fiunt et ad populum pertinent.

63. Postea Lupo et Largo Consulibus senatus censuit, ut bona Latinorum primum ad eum pertinerent qui eos liberasset ; deinde ad liberos eorum non nominatim exheredatos, uti quisque proximus esset ; tunc antiquo iure ad heredes eorum qui liberassent pertinerent. (64.) Quo senatusconsulto quidam *id* actum esse putant, ut in bonis Latinorum eodem iure utamur, quo utimur in hereditate civium Romanorum libertinorum ; idemque maxime Pegaso placuit. quae sententia aperte falsa est. nam civis Romani liberti hereditas numquam ad extraneos

three brothers take three portions and the only son the fourth : but the goods of Latins belong to the successors in the same proportion as that in which they would have belonged to the manumittor himself. 62. Likewise, if one of these patrons refuse his share in the inheritance of a freedman who is a Roman citizen, or die before he makes cretion<sup>1</sup> for it, the whole inheritance belongs to the other : but the goods of a Latin, so far as regards the portion of the patron who fails, become lapses<sup>2</sup> and belong to the *populus*.

63. Afterwards, in the consulship of Lupus and Largus<sup>3</sup>, the senate decreed that the goods of Latins should devolve ; firstly, on him who freed them ; secondly on the descendants of such persons (manumittors), not being expressly disinherited, according to their proximity : and then, according to the ancient law, should belong to the heirs<sup>4</sup> of those who had freed them.

64. The result of which *senatusconsultum* some think to be that we apply the same rules to the goods of Latins, which we apply to the inheritance of freedmen who are Roman citizens : and this was maintained by Pegasus in particular. But this opinion is plainly false. For the inheritance of a freedman who is a Roman citizen never belongs to the extraneous heirs

<sup>1</sup> II. 164.

<sup>2</sup> II. 206.

<sup>3</sup> A. D. 41.

<sup>4</sup> *Sc. scripti heredes*.

patroni heredes *pertinet*: *bona autem* Latinorum etiam ex hoc ipso *senatusconsulto* non obstantibus liberis manumissoris etiam ad extraneos heredes pertinent. item in hereditate civis Romani liberti liberis manumissoris nulla exheredatio nocet: in bonis Latinorum *autem* nocere nominatim factam exheredationem ipso *senatusconsulto* significatur. Verius est ergo hoc solum eo *senatusconsulto* actum esse, ut manumissoris liberi qui nominatim exheredati non sint praeferantur extraneis heredibus. (65.) *Itaque* et emancipatus filius patroni praeteritus, quamvis contra tabulas testamenti parentis sui bonorum possessionem non petierit, tamen extraneis heredibus in bonis Latinorum potior habetur. (66.) Item filia ceterique quos exheredes licet iure civili *facere inter ceteros*, *quamvis id sufficiat*, ut ab omni hereditate patris sui *summovcantur*, tamen in bonis Latinorum, nisi nominatim a parente fuerint exheredati, potiores erunt extraneis heredibus. (67.) Item ad liberos qui ab hereditate parentis se abstinuerunt, *bona Latinorum pertinent*, *quamvis*

of his patron: whilst the goods of Latins, even by this *senatusconsultum*, belong to extraneous heirs as well, if no children of the manumittor prove a bar. Likewise, in regard to the inheritance of a freedman who is a Roman citizen, no disinheritance is of prejudice to the children of the manumittor, whilst in regard to the goods of Latins, it is stated in the *senatusconsultum* itself that a disinheritance made expressly does prejudice. It is more correct, therefore, to say that the only effect of this *senatusconsultum* is that the children of a manumittor, who are not expressly disinherited, are preferred to the extraneous heirs. 65. Therefore, even the emancipated son of a patron, when passed over, is considered to have a better claim to the goods of Latins than the extraneous heirs have, notwithstanding that he may not have sued for the possession of the goods of his parent "against the tablets of the testament." 66. Likewise, a daughter and all others whom it is allowable at the civil law to disinherit by a general clause, although this proceeding is sufficient to debar them from all the inheritance of their ascendant, yet have a claim to the goods of Latins superior to that of extraneous heirs, unless they have been expressly disinherited by their ascendant. 67. Likewise, the goods of Latins belong to descendants who have declined to take up the inheritance of their ascendant, although

*alieni habeantur a paterna hereditate, quia ab hereditate exhereditati nullo modo dici possunt, non magis quam qui testamento silentio praeteriti sunt.* (68.) *Ex his omnibus satis illud apparet, si is qui Latinum fecerit,—[desunt 25 lin.]* (69.) — — *putant ad eos pertinere, quia nullo interveniente extraneo herede senatusconsulto locus non est.* (70.) *Sed si cum liberis suis etiam extraneum heredem patronus reliquerit, Caelius Sabinus ait tota bona pro virilibus partibus ad liberos defuncti pertinere, quia cum extraneus heres intervenit, non habet lex Iunia locum, sed senatusconsultum.* Javolenus autem ait tantum eam partem ex senatusconsulto liberos patroni pro virilibus partibus habituros esse, quam extranei heredes ante senatusconsultum lege Iunia habituri essent, reliquas vero partes pro

they are esteemed aliens from the ancestral inheritance; because they can by no means be said to be disinherited from the inheritance, any more than those who are passed over in silence in a testament. 68. From all that has been said it is quite clear that if he who has made a man a Latin..... 69. they think, belongs to them, because as no extraneous heir is concerned, the *senatusconsultum* does not apply<sup>1</sup>. 70. But if a patron have left a stranger heir conjointly with his descendants, Caelius Sabinus says that all the goods (of the Latin) belong to the children in equal shares, because, when an extraneous heir is introduced, the Lex Iunia does not apply, but the *senatusconsultum*<sup>2</sup> does. Javolenus, on the other hand, says that the children of the patron will only take that portion in equal shares according to the *senatusconsultum*, which the extraneous heirs would have had by the Lex Iunia before the *senatus-*

<sup>1</sup> Göschen imagines that if the lacuna were filled up, the sense would be: "The goods of a Latin are divided amongst the children of the manumittor in proportion to their shares in the inheritance, provided these children be the sole heirs and no stranger be conjoined with them." The case of a stranger being conjoined with them is considered in the next paragraph.

<sup>2</sup> Sc. S. C. of Lupus and Largus. As no mention of an equal division being enjoined by the S. C. is to be

found in the portion of the text preserved to us, it must have occurred in the fragmentary paragraphs 68 and 69. The S. C. took away the goods of the Latin from the extraneous heirs, in favour of children not expressly disinherited. A clause therefore would be needed in the law to say how these should be divided, whether according to the portions in which the children had been appointed heirs, (if they were appointed,) or equally. The text tells us the law declared for equality of division.

hereditariis partibus ad eos pertinere. (71.) Item quaeritur, an hoc senatusconsultum ad eos patroni liberos pertineat qui ex filia neptēve procreantur, id est ut nepos meus ex filia potior sit in bonis Latini mei quam extraneus heres. item *an* ad maternos Latinos hoc senatusconsultum pertineat, quaeritur, id est ut in bonis Latini materni potior sit patronae filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto. sed huius sententiam plerique improbant, quia senatus de his liberis patronarum nihil sentiat, qui aliam familiam sequerentur. idque ex eo adparet, quod nominatim exheredatos summozet: nam videtur de his sentire qui exheredari a parente solent, si heredes non instituantur; neque autem matri filium filiamve, neque avo materno nepotem neptemve, si eum eamve heredem non instituat, exheredare necesse est, sive de iure civili quaeramus, sive de edicto Praetoris quo praeteritis liberis contra tabulas testamenti bonorum possessio promittitur.

*consultum*; but that the other parts belong to them in the ratio of their shares in the inheritance. 71. Likewise, it is a disputed point whether this *senatusconsultum* applies to descendants of a patron through a daughter or granddaughter, *i.e.* whether my grandson by my daughter has a claim to the goods of my Latin prior to that of my extraneous heir. Likewise, it is disputed whether this *senatusconsultum* applies to Latins belonging to a mother, *i.e.* whether the son of a patroness has a claim to the goods of a Latin belonging to his mother prior to that of the extraneous heir of his mother. Cassius thought that the *senatusconsultum* was applicable in either case, but his opinion is generally disapproved of, because the senate would not have these descendants of patronesses in their thoughts, inasmuch as they belong to another family. This appears also from the fact, that they debar those disinherited expressly: for they seem to have in view those who are usually disinherited by an ascendant, supposing they be not instituted heirs; whereas there is no necessity either for a mother to disinherit her son or daughter, or for a maternal grandfather to disinherit his grandson or granddaughter, if they do not appoint them heirs; whether we look at the rules of the civil law, or at the edict of the Praetor, in which possession of goods “against the tablets of the testament” is promised to children who have been passed over.



72. Aliquando tamen civis Romanus libertus tamquam Latinus moritur, veluti si Latinus salvo iure patroni ab Imperatore ius Quiritium consecutus fuerit: nam *ita* divus Traianus constituit, si Latinus invito vel ignorante patrono ius Quiritium ab Imperatore consecutus sit. quibus casibus dum vivit iste libertus, ceteris civibus Romanis libertis similis est et iustos liberos procreat, moritur autem Latini iure, nec ei liberi eius heredes esse possunt; et in hoc tantum habet testamenti factionem, ut patronum heredem instituat, eique, si heres esse noluerit, alium substituere possit. (73.) Et quia hac constitutione videbatur effectum, ut numquam isti homines tamquam cives Romani morerentur, quamvis eo iure postea usi essent, quo vel ex lege *Aelia Sentia* vel ex senatusconsulto cives Romani essent: divus Hadrianus iniquitate rei motus auctor fuit senatusconsulti faciundi, ut qui ignorante vel recusante patrono ab Imperatore ius Quiritium consecuti essent, si eo iure postea usi essent, quo ex

72. Sometimes, however, a freedman who is a Roman citizen dies as a Latin; for example, if a Latin have obtained from the Emperor the *jus Quiritium* with a reservation of the rights of his patron: for the late Emperor Trajan made a constitution to this effect, to meet the case of a Latin obtaining the *jus Quiritium* from the Emperor against the will or without the knowledge of his patron. In such instances, the freedman, whilst he lives, is on the same footing with other Roman citizens, and begets legitimate children, but he dies subject to the rules of a Latin, and his children cannot be heirs to him: and he has the right of making a testament only thus far, that he may institute his patron heir, and substitute another for him in case he decline to be heir. 73. Since then the effect of this constitution seemed to be that such men could never die as Roman citizens, although they had afterwards availed themselves of the means whereby, either according to the *Lex Aelia Sentia*<sup>1</sup> or the *senatusconsultum*<sup>2</sup>, they could become Roman citizens; the late Emperor Hadrian, moved by the want of equity in the matter, caused a *senatusconsultum* to be passed, that those who had obtained the *jus Quiritium* without the knowledge or against the will of their patron, if they

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<sup>1</sup> l. 29.

<sup>2</sup> See the S. C. referred to in l. 67—73. See particularly §§ 69, 70.



lege Aelia Sentia vel ex senatusconsulto, si Latini mansissent, civitatem Romanam consequerentur, proinde ipsi haberentur, ac si lege Aelia Sentia vel senatusconsulto ad civitatem Romanam pervenissent.

74. Eorum autem quos lex Aelia Sentia dediticiorum numero facit, bona modo quasi *civium Romanorum* libertorum, modo quasi Latinorum ad patronos pertinent. (75.) nam eorum bona qui, si in aliquo vitio non essent, manumissi cives Romani futuri essent, quasi civium Romanorum patronis eadem lege tribuuntur. non tamen hi habent etiam testamenti factionem; nam id plerisque placuit, nec inmerito: nam incredibile videbatur pessimae condicionis hominibus voluisse legis latorem testamenti faciundi ius concedere. (76.) Eorum vero bona qui, si non in aliquo vitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis, ac si Latini decessissent. nec me

afterwards availed themselves of the means whereby, if they had remained Latins, they would have obtained Roman citizenship according to the Lex Aelia Sentia or the *senatusconsultum*, should be regarded in the same light as if they had attained to Roman citizenship according to the Lex Aelia Sentia or the *senatusconsultum*.

74. The goods of those whom the Lex Aelia Sentia puts into the category of *dediticii*<sup>1</sup> belong to their patrons, sometimes like those of freedmen who are Roman citizens, sometimes like those of Latins. 75. For the good of those who on their manumission would have been Roman citizens, if they had been under no taint, are by this law assigned to the patrons, like those of freedmen who are Roman citizens; but such persons have not at the same time *testamenti factio*<sup>2</sup>: for most lawyers are of this opinion, and rightly: since it seemed incredible that the author of the law should have intended to grant the right of making a testament to men of the lowest *status*. 76. But the goods of those who on their manumission would have been Latins, if they had been under no taint, are assigned to the patrons, exactly as though the freedmen had died Latins. I am not, however, unaware that

<sup>1</sup> l. 13.

in its most comprehensive sense. See

<sup>2</sup> *Etiā* = like other *Cives Romani* l. 25, and note on II. 114.

*Testamenti factio* is here used

praeterit non satis in ea re legis latorem voluntatem suam verbis expressisse.

77. Videamus autem et de ea successione quae nobis ex emptione bonorum competit. (78.) Bona autem veneunt aut vivorum aut mortuorum. vivorum, velut eorum qui fraudationis causa latitant, nec absentes defenduntur; item eorum qui ex lege Julia bonis cedunt; item iudicatorum post tem-

on this point the author of the law has not clearly expressed his intention in words.

77. Now let us consider that succession which belongs to us through the purchase of a man's goods (*emptio bonorum*). 78. The goods which are sold may belong either to living or dead persons: living persons, for instance, when men conceal themselves with a fraudulent intent, or are not defended in their absence; likewise, when men make a *cessio bonorum*<sup>1</sup> according to the Lex Julia; likewise, the goods of judgment-

<sup>1</sup> See Mackeldey, p. 456, § 2. *Cessio bonorum* was a voluntary delivery of his goods by an insolvent, which saved him from the personal penalties of the old law. These penalties were as follows: (1) On failure to meet an engagement entered into by *nexum* (i. e. by provisional mancipation which a man made of himself and his estate as security against non payment) the creditor claimed the person and property of the debtor, and these were at once assigned (*adducbantur*) to him: (2) On failure to meet engagements made in any other way, a judgment had first to be obtained and then, if after thirty days' delay payment were not made, the *addictio* followed, as in the first case. An *addictus* was at once carried off and imprisoned by his creditor, but a space of 60 days was still allowed during which he might be redeemed by payment of the debt by any friend who chose to come forward; and to afford facilities for such redemption a proclamation of the amount and circumstances of the debt was made three times, on the *nundinae*, within the 60 days. If no payment were made within this

time, the *addictio* became final; the debtor's *cititas* was lost, and the creditors might even kill him or sell him beyond the Tiber. If there were several creditors, the law of the Twelve Tables, quoted by A. Gellius was applicable: "Tertius nudius partes secanto; si plus minusve secuerunt se (i. e. sine) fraude esto." A. Gell. XX. 1. 49.

Savigny holds that *addictio* was originally a remedy only applicable when there was a failure to repay money lent (*certa pecunia credita*); and that the patricians, to increase their power over their debtors invented the transaction called *nexum*, whereby all obligations could be turned into the form of an acknowledgment of money lent, and whereby also the interest could be made a subject of *addictio* as well as the principal: for under the old law the remedy against the debtor's person was only in respect of the principal.

Niebuhr is of opinion that *addictio* of the debtor's person was done away with by the *Lex Poetilia* A.U.C. 424; see *Hist. of Rome*, III. 154, Smith's edition, 1851.

### *Emptio Bonorum.*

pus, quod eis partim lege XII tabularum, partim edicto Praetoris ad expediendam pecuniam tribuitur. mortuorum bona veneunt velut eorum, quibus certum est neque heredes neque bonorum possessores neque ullum alium iustum successorem existere. (79.) Si quidem vivi bona veneant, iubet ea Praetor per dies continuos xxx possideri et proscribi; si vero mortui, post dies xv postea iubet convenire creditores, et ex eo numero magistrum creari, id est eum per quem bona veneant. itaque si vivi bona veneant, in diebus *pluribus* *veniri* iubet, si mortui, in *diebus paucioribus*; nam vivi bona xxx, mortui vero xx emptori addici iubet. quare autem tardius viventium bonorum venditio compleri iubetur, illa ratio est, quia de vivis curandum erat, ne facile bonorum venditiones paterentur.

debtors, after the expiration of the time which is granted them, in some cases by a law of the 'Twelve Tables', in others by the Praetor's edict, for the purpose of raising the money. The goods of dead persons are also sold; for example, those of men to whom it is certain that there will be neither heirs, *bonorum possessores*<sup>2</sup>, nor any other lawful successor. 79. If then the goods of a living person be sold, the Praetor orders them to be taken possession of (by the creditors) for thirty successive days, and to be advertized for sale: but if those of a dead person, he orders that after fifteen days the creditors shall meet, and out of their number a *magister* be appointed, i.e. one by whom the goods are to be sold. Also, if the goods sold be those of a living person, he orders them to be sold (for delivery) after a longer period, if those of a dead person (for delivery) after a shorter period; for he commands that the goods of a living person shall be assigned over to the purchaser after thirty days, but those of a dead person after twenty<sup>3</sup>. And the reason why the sale of the goods of living persons is ordered to become binding after a longer interval is this, that care ought to be taken when living persons are concerned, that they have not to submit to sales of their goods without good reason.

<sup>1</sup> IV. 21, see XII. Tab., Tab. III. l. 3.

<sup>2</sup> III. 32.

<sup>3</sup> The number of the days in this passage is given according to Gneist's

text, but it is as well to know that the reading is disputed by Hollweg, Lachmann and Huschke, as Gneist himself states in a note.

### *Bonorum emptores.*

80. Neque autem bonorum possessorum neque emptorum res pleno iure fiunt, sed in bonis efficiuntur; ex iure Quiritium autem ita demum adquiruntur, si usuceperunt. interdum quidem bonorum emptorum idem plane ius quod est mancipum esse intelligitur, si per eos scilicet bonorum emptoribus addicatur qui publice sub hasta vendunt [deest 1 lin.]. (81.) Item quae debita sunt ei cuius fuerunt bona, aut ipse debuit, neque bonorum possessorum neque bonorum emptorum ipso iure debent aut ipsis debentur: sed de omnibus rebus utilibus actionibus et conveniuntur et experiuntur, quas inferius proponemus.

82. Sunt autem etiam alterius generis successiones, quae neque lege XII tabularum neque Praetoris edicto, sed eo

80. Now the property does not vest in full title either in the possessors of goods<sup>1</sup> or the purchasers of goods, but it is merely theirs *in bonis*, and is acquired *ex iure Quiritium* only upon completion of usucapion<sup>2</sup>. Sometimes, indeed, the title of *bonorum emptores* is regarded as being nearly equivalent to that of *mancipes*<sup>3</sup>; if, that is to say, the assignment to the purchasers of the goods be made by those who sell publicly, *sub hasta* (i.e. by auction). 81. Likewise, debts owing to him to whom the goods belonged, or debts which he owed, are not by the letter of the law due either to the possessors of goods or the purchasers of goods, or due from them: but on all matters such persons are sued and sue by *actiones utiles*<sup>4</sup>, of which we shall give an account hereafter.

82. There are besides successions of another kind, which have been introduced into practice neither by any law of the Twelve Tables, nor by the Praetor's edict, but by those

*possessorum* = those whom the Praetor recognizes as successors, although they have not the *hereditas* at the Civil Law. Conf. IV. 34; III. 32. Gaius at this point digresses for an instant into the law of intestate or testamentary succession.

<sup>1</sup> II. 42.

<sup>2</sup> A *manceps* according to Festus and Asconius Pedianus was the representative of a body of *publicani* in partnership; and where taxes

were bought or hired by them from the state, this person attended the auction and made the bargain for the body (*societas*) by holding up his hand; hence the name. On the censor at the sale recognizing a particular *manceps* as a purchaser, the legal consequence was that the full *dominium* was transferred to him for the body, whether the subject of the sale were a *res mancipi* or a *res nec mancipi*.

<sup>4</sup> IV. 34, 35. See note on II. 78.

*Liability of the adopter for the adopted.*

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iure quod consensu receptum est introductae sunt. (83.) *Ecce enim cum paterfamilias se in adoptionem dedit, mulierve in manum convenit, omnes eius res incorporales et corporales quaeque ei debitae sunt, patri adoptivo coemptionatorive adquiruntur, exceptis iis quae per capitis diminutionem pereunt, quales sunt usufructus, operarum obligatio libertorum quae per iusiurandum contracta est, et quae continentur legitimo iudicio.*

84. *Sed ex diverso quod debet is qui se in adoptionem dedit, vel quae in manum convenit, ad ipsum quidem coemptionatorem aut ad patrem adoptivum pertinet hereditarium aes alienum, proque eo, quia suo nomine ipse pater adoptivus aut coemptionator heres fit, directo tenetur iure, non vero is qui se adoptandum dedit, quaeve in manum convenit, quia desinit iure civili heres esse. de eo vero quod prius suo nomine eae personae debuerint, licet neque pater adoptivus teneatur neque coemptionator, neque ipse quidem qui se in adoptionem dedit vel quae in manum*

rules which are received by general consent. 83. To take an instance, when a person *sui juris* has given himself in adoption, or a woman has made *conventio in manum*<sup>1</sup>, all their property, incorporeal and corporeal, and all that is due to them, is acquired by the adopting father or *coemptionator*, except those things which perish by a *capitis diminutio*, of which kind are usufruct, a claim to the services of freedmen contracted by oath<sup>2</sup>, and matters secured by a statutable action<sup>3</sup>.

84. But, on the other hand, a debt owing by him who has given himself in adoption, or by a woman who has made *conventio in manum*, attaches upon the *coemptionator* or the adopting father himself, if it be an inheritable debt, and he is liable for it by direct proceedings, since such adopting father or *coemptionator* becomes heir personally (*suo nomine*); and he is not directly liable who has given himself to be adopted, nor is the woman who has made *conventio in manum*, because they cease to be heirs at the civil law. But with regard to a debt which such persons previously owed on their own account, although neither the adopting father nor the *coemptionator* is liable, nor does the man himself who gave himself to be adopted, nor the woman who made the *conventio* remain

<sup>1</sup> I. 108 et seqq.

<sup>2</sup> See note on I. 26.

<sup>3</sup> III. 181.

convenit, maneat obligatus obligataque, quia scilicet per capitis diminutionem liberetur, tamen in eum eamve utilis actio datur rescissa capitis diminutione : et si adversus hanc actionem non defendantur, quae bona eorum futura fuissent, si se alieno iuri non subiecissent, universa vendere creditoribus Praetor permittit.

85. Item si is ad quem ab intestato legitimo iure pertinet hereditas eam hereditatem, antequam cernat aut pro herede gerat, alii in iure cedat, pleno iure heres fit is cui eam cesserit, perinde ac si ipse per legem ad hereditatem vocaretur. quodsi posteaquam heres extiterit, cesserit, adhuc heres manet et ob id creditoribus ipse tenebitur : sed res corporales transferet proinde ac si singulas in iure cessisset ; debita vero pereunt, eoque modo debitores hereditarii lucrum faciunt. (86.) Idem iuris est, si testamento scriptus heres, posteaquam heres extiterit, in iure cesserit hereditatem. ante aditam vero hereditatem cedendo nihil agit. (87.) Suus autem et necessarius heres an aliquid

bound, being freed by the *capitis diminutio*, yet an *utilis actio* is granted against them, the *capitis diminutio* being treated as non-existent : and if they be not defended<sup>1</sup> against this action, the Praetor permits the creditors to sell all the goods which would have been theirs if they had not rendered themselves subject to another's authority<sup>2</sup>.

85. Likewise, if a man to whom an intestate inheritance belongs by statute law, make *cessio in jure*<sup>3</sup> of it to another before exercising his cretion<sup>4</sup> or acting as heir, he to whom the cession is made becomes heir in full title, just as if he had himself been called to the inheritance by law<sup>5</sup>. But if he make the cession after he has taken up the inheritance, he still remains heir, and will therefore be liable personally to the creditors : but he will convey the corporeal property just as if he had made cession of each article separately : the debts, however, perish, and thus the debtors to the inheritance are profited. 86. The rule is the same if the heir appointed in a testament make cession after taking up the inheritance<sup>6</sup> ; although by making cession previously to entering on the inheritance he effects nothing. 87. Whether a *suus heres*

<sup>1</sup> Sc. by the *coemptorator* or adopting father.

<sup>2</sup> IV. 38, 80.

<sup>3</sup> II. 24.

<sup>4</sup> II. 35.

<sup>5</sup> II.

<sup>6</sup> II. 164.

agant in iure cedendo, quaeritur. nostri praeceptores nihil eos agere existimant: diversae scholae auctores idem eos agere putant, quod ceteri post aditam hereditatem; nihil enim interest, utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur. [*lin. vacua.*]

88. *Nunc transeamus* ad obligationes. quarum summa divisio in duas species deducitur: omnis enim obligatio vel ex contractu nascitur vel ex delicto.

89. Et prius videamus de his quae ex contractu nascuntur. harum quattuor genera sunt: aut enim re *contrahitur* obligatio, aut verbis, aut litteris, aut consensu.

90. Re *contrahitur* obligatio velut mutui datione. *quae pro-*

and a *necessarius heres* can effect anything by a *cessio in jure*, is disputed<sup>1</sup>. Our authorities think their act is void: the authorities of the other school think that they effect the same as other heirs who have entered upon an inheritance, for it makes no difference whether a man become heir by cretion, or by acting as heir, or whether he be compelled to (enter upon) the inheritance by necessity of law<sup>2</sup>.

88. Now let us pass on to obligations<sup>3</sup>; the main division whereof is drawn out into two species: for every obligation arises either from contract or from delict.

89. First, then, let us consider as to those which arise from contract<sup>4</sup>. Of these there are four kinds, for the obligation is contracted either *re*, *verbis*, *litteris*, or *consensu* (by the thing itself, by words, by writing, or by consent).

90. An obligation is contracted *re*, for example, by the

<sup>1</sup> II. 37.

<sup>2</sup> To understand this passage fully we must recollect that a *suus heres*, as well as a *necessarius*, cannot free himself from the inheritance, in name at least. See II. 157.

<sup>3</sup> Justinian says: "Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendae rei secundum nostrae civitatis jura." The latter words of the definition indicate that no obligation was recognized by the law unless it could be enforced by action.

<sup>4</sup> Gaius does not define a contract in his commentaries. Three ele-

ments go to its constitution, an offer from the one party, an acceptance by the other, an obligation imposed by the law compelling the parties to abide by their offer and acceptance. When the law does not impose such obligation, the agreement is only a *factum*, and cannot found an action, although it may be used as a defence. The Roman law regarded those agreements as contracts which were solemnized in the four ways named in the text, *re*, *verbis*, *litteris*, or *consensu*. For a list of these contracts see Appendix (I).



prie in his fere rebus contingit quæ [res] pondere, numero, mensura constant: qualis est pecunia numerata, vinum, oleum, frumentum, aes, argentum, aurum. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eadem, sed alia eiusdem naturae redantur: unde etiam mutuum appellatum est, quia quod ita tibi a me datum est ex meo tuum fit. (91.) Is quoque qui non debitum accepit ab eo qui per errorem solvit re obligatur. nam proinde ei condici potest SI PARET EUM DARE OPORTERE, ac si mutuum accepisset. unde quidam putant pupillum aut mulierem

giving of a *mutuum*. Strictly speaking, this gift deals chiefly with those things which are matters of weight, number, and measure, such as coin, wine, oil, corn, brass, silver, gold. And these we give by counting, measuring, or weighing them, with the intent that they shall become the property of the recipients, and that at some future time not the same, but others of like nature shall be restored to us: whence also the transaction is called *mutuum*, because what is so given to you by me becomes yours from being mine. 91. He also who receives a payment not due to him from one who makes the payment by mistake is bound *re*. For the condictio<sup>1</sup> (worded): "should it appear that he ought to give" can be brought against him just as though he had received a *mutuum*<sup>2</sup>. Wherefore, some hold that a pupil or a woman to whom that which

<sup>1</sup> IV. 4. 5.

<sup>2</sup> This is not a case of contract at all, but of what is called quasi-contract. Justinian (III. 13) divides obligations into four classes, the classes additional to those of Gaius being *quasi ex contractu*, *quasi ex delicto*. These quasi-contracts are as Austin clearly shows—"Acts done by one person to his own inconvenience for the advantage of another, but without the authority of the other, and consequently without any promise on the part of the other to indemnify him or reward him for his trouble. An obligation therefore arises such as would have arisen had the one party contracted to do the act and the other to indemnify or reward." A quasi-delict, on the other hand, is

"an incident by which damage is done to the obligee (though without the negligence or intention of the obligor), and for which damage the obligor is bound to make satisfaction. It is not a delict, because intention or negligence is of the essence of a delict."

The truth is that in both cases an incident begets an obligation, and until the breach of that obligation by refusal to indemnify or make satisfaction there is neither contract nor delict, although after such refusal there is no doubt a delict. So Gaius himself says elsewhere: "*Obligatio-nes aut ex contractu nascuntur, aut ex maleficio, aut proprio quodam jure ex variis causarum figuris.*" D. 44-7. 1. pr.



### *Verbal Obligations or Stipulations.*

cui sine tutoris auctoritate non debitum per errorem datum est non teneri condictione, non magis quam mutui datione. sed haec species obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere vult negotium quam contrahere.

92. Verbis obligatio fit ex interrogatione et responsione, velut: DARI SPONDES? SPONDEO; DABIS? DABO; PROMITTIS? PROMITTO; FIDE PROMITTIS? FIDE PROMITTO; FIDE IUBES? FIDE IUBEBO; FACIES? FACIAM. (93.) Sed haec quidem verborum obligatio: DARI SPONDES? SPONDEO, propria civium Romanorum est, ceterae vero iuris gentium sunt; itaque inter omnes homines, sive cives Romanos sive peregrinos, valent. et quamvis ad Graecam vocem expressae fuerint, velut hoc modo: [δώσεις; δώσω· ὁμολογεῖς; ὁμολογῶ· πίστει κελεύεις; πίστει κελεύω· ποιήσεις; ποιήσω]; etiam haec tamen inter cives Romanos valent, si modo Graeci sermonis intellectum habeant. et e contrario quamvis Latine enuntientur, tamen etiam inter peregrinos va-

is not due has been given by mistake without the authorization of the tutor is not liable to the condiction, any more than he or she would be in the case of a *mutuum* having been given. But this species of obligation does not seem to arise from contract, since he who gives with the intent of paying wishes rather to end than to begin a contract.

92. An obligation *verbis* originates from a question and answer, for instance: Do you engage that it shall be given? I do engage. Will you give? I will give. Do you promise? I do promise. Do you become *fidepromissor*? I do become *fidepromissor*. Do you become *fidejussor*? I do become *fidejussor*. Will you do? I will do. 93. But the verbal obligation: Do you engage that it shall be given? I do engage: is peculiar to Roman citizens, whilst the others appertain to the *jus gentium*, and therefore hold good amongst all men, whether Roman citizens or foreigners. And even if they be expressed in the Greek language, as thus: δώσεις; δώσω· ὁμολογεῖς; ὁμολογῶ· πίστει κελεύεις; πίστει κελεύω· ποιήσεις; ποιήσω, they still hold good amongst Roman citizens, provided only they understand Greek. And conversely, though they be pronounced in Latin, they nevertheless hold good

lent, si modo Latini sermonis intellectum habeant. at illa verborum obligatio: DARI SPONDES? SPONDEO, adeo propria civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit; quamvis dicatur a Graeca voce figurata esse. (94.) Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, velut si Imperator noster principem alicuius peregrini populi de pace ita interroget: PACEM FUTURAM SPONDES? vel ipse eodem modo interrogetur, quod nimium subtiliter dictum est; quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur. (95.) Illud dubitari potest, si quis [*desunt 24 lin.*].

96. — obligentur: utique *cum* quaeritur de iure Romanorum.

amongst foreigners also, provided only they understand Latin. But the verbal obligation: Do you engage that it shall be given? I do engage: is so peculiar to Roman citizens that it cannot properly be transferred into Greek by interpretation; although it is said to be derived from a Greek word<sup>1</sup>. 94. Hence it is said that in one case a foreigner also can be bound by this word, for instance, if our emperor interrogate the prince of some foreign people regarding peace: Do you engage that there shall be peace? or if he be himself interrogated in like manner. But this is laid down with too much refinement: because if anything be done against the agreement, an action is not brought on the stipulation, but the matter is redressed according to the rules of war. 95. It may be doubted if any one<sup>2</sup>.....

96. .... are bound: at any rate when the question is as to Roman law. For as to the law amongst foreigners, if we

<sup>1</sup> Sc. from

<sup>2</sup> Twenty-four lines are lost here; but by comparison with the Epitome we may conjecture what was the substance of the missing portion. First the question was discussed whether the two contracting parties might speak in different languages, which probably was settled in the affirmative. Then two cases were alluded to in which a verbal contract might be unilateral in form, i. e. in which no question need precede the promise. These were (1) *dotis datio*,

or a promise of dower made by the wife, the intended wife, or the father of the intended wife, to the husband or intended husband, (2) a promise made by a freedman to his patron and confirmed by oath. 111. 83. Ulp. VI. 1. 2. We say "unilateral in form": for it is obvious that stipulations generally were bilateral in form, although they were invariably unilateral in essence, the whole burden lying on one party, the whole benefit accruing to the other.

nam apud peregrinos quid iuris sit, singularum civitatum iura requirentes aliud in *alia* lege reperimus.

97. Si id quod dari stipulamur tale sit, ut dari non possit, inutilis est stipulatio: velut si quis hominem liberum quem servum esse credebat, aut mortuum quem vivum esse credebat, aut locum sacrum vel religiosum quem putabat esse humani iuris, *sibi* dari stipuletur. (97 a.) *item si quis rem quae in rerum natura non est aut esse non potest, velut hippocentaurum stipuletur, aequè inutilis est stipulatio.*

98. Item si quis sub ea condicione stipuletur quae existere non potest, *veluti* si digito caelum tetigerit, inutilis est stipulatio. sed legatum sub impossibili condicione relictum nostri praeceptores proinde *valere* putant, ac si *ea condicio adiecta non* esset: *diversae* scholae auctores non minus legatum inutile

enquire into the rules of individual states, we shall find one thing in one system of legislation, another in another<sup>1</sup>.

97. If that which we stipulate<sup>2</sup> shall be given is of such a kind that it cannot be given, the stipulation is void: for instance, if a man stipulate for a free man to be given to him whom he thought to be a slave, or a dead man whom he thought to be alive, or a place sacred or religious which he thought to be *humani iuris*<sup>3</sup>. 97 a. Likewise if any one stipulate for a thing which does not exist or cannot exist, for instance a centaur, the stipulation is in such a case also void.

98. Likewise, if any one stipulate under a condition which cannot come to pass, for instance, "if he touch Heaven with his finger," the stipulation is void. But our authorities think that a legacy left under an impossible condition is as valid as it would be if the condition had not been conjoined: the

<sup>1</sup> See III. 120, note.

<sup>2</sup> Gaius uses the verb *stipulor* here for the first time, without having defined it: the *stipulator* is the interrogator in an obligation *verbis: stipulor* therefore signifies to ask for in solemn form.

As to the derivation of the word *stipulatio* there are many theories: Paulus connects it with *stipulus*, an adjective signifying firm (S. R. v.

7. 1): Festus and Varro with a coin (Varro, *de Ling. Lat.* v. 182): Isidorus with *stipula*, a straw, because, he says, in olden times the contracting parties used to break a straw in two and each retain a portion, so that by reuniting the broken ends "*sponsiones suas*" (Orig. *Verb.* 24, § 30.)

<sup>3</sup> II. 2—4.

existimant, quam stipulationem. et sane vix idonea diversitatis ratio reddi potest. (99.) Praeterea inutilis est stipulatio, si quis ignorans rem suam esse eam sibi dari stipuletur; nam id quod alicuius est, id ei dari non potest.

100. Denique inutilis est talis stipulatio, si quis ita dari stipuletur: POST MORTEM MEAM DARI SPONDES? vel ita: POST MORTEM TUAM DARI SPONDES? valet autem, si quis ita dari stipuletur: CUM MORIAR DARI SPONDES? vel ita: CUM MORIERIS DARI SPONDES? id est ut in novissimum vitae tempus stipulatoris aut promissoris obligatio conferatur. nam inelegans esse visum est ex heredis persona incipere obligationem. rursus ita stipulari non possumus: PRIDIE QUAM MORIAR, aut: PRIDIE QUAM MORIERIS, DARI SPONDES? quia non potest aliter intelligi pridie quam aliquis morietur, quam si mors secuta sit; rursus morte secuta in praeteritum reducitur stipulatio et quodammodo talis est: HEREDI MEO DARI SPONDES? quae

authorities of the other school think the legacy no less invalid than the stipulation. And truly a satisfactory reason for the difference can scarcely be given. 99. Besides a stipulation is void, if a man in ignorance that a thing is his own stipulate for it to be given to him: for that which is a man's cannot be given to him.

100. Lastly, a stipulation of the following kind is void, if a man stipulate thus for a thing to be given: Do you engage that it shall be given after my death? or thus: Do you engage that it shall be given after your death? But it is valid if a man thus stipulate for it to be given: Do you engage that it shall be given when I am dying? or thus: Do you engage that it shall be given when you are dying? i.e. that the obligation shall be referred to the last instant of the life of the stipulator or promiser. For it seems anomalous that the obligation should begin in the person of the heir. Again, we cannot stipulate thus: Do you engage that it shall be given the day before I die, or the day before you die? Because which is the day before a person dies cannot be ascertained unless death has ensued: and again, when death has ensued, the stipulation is thrown into the past, and is in a manner of this kind: Do you engage that it shall be given to my heir? which is undoubtedly invalid. 101. Whatever we

sane inutilis est. (101.) Quaecumque de morte diximus, eadem et de capitis diminutione dicta intelligemus.

102. Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit non responderit : velut si sestertia x a te dari stipuler, et tu *nummum sestertium v milia* promittas ; aut si ego pure stipuler, tu sub condicione promittas.

103. Praeterea inutilis est stipulatio, si ei dari stipulemur cuius iuri subiecti non sumus : unde illud quaesitum est, si quis sibi et ei cuius iuri subiectus non est dari stipuletur, in quantum valeat stipulatio. nostri praeceptores putant in universum valere, et proinde ei soli qui stipulatus sit solidum deberi, atque si extranei nomen non adiecisset. sed diversae scholae auctores *dimidium ei deberi* existimant, pro aliena—[*desunt 4 lin.*].

104. *Item inutilis est stipulatio, si ab eo stipuler qui iuri meo subiectus est, vel si is a me stipuletur. sed de servis et de his qui in mancipio sunt illud praeterea ius observatur, ut non solum*

have said about death we shall also understand to be said about *capitis diminutio*<sup>1</sup>.

102. Further, a stipulation is void if a man do not reply to the question he is asked ; for instance, if I should stipulate for ten *sestertia* to be given by you, and you should promise five *sestertia* : or if I should stipulate unconditionally, and you promise under a condition.

103. Further, a stipulation is void if we stipulate for a thing to be given to him to whose authority we are not subject : hence this question arises, if a man stipulate for a thing to be given to himself and one to whose authority he is not subject, how far is the stipulation valid ? Our authorities think it is valid to the full amount, and that the whole is due to him alone who stipulated, just as though he had not added the name of the stranger. But the authorities of the other school think half is due to him.....

104. Likewise, a stipulation is void if I stipulate for payment from one who is subject to my authority, or if he stipulate for payment from me. But there is this rule further observed in regard to slaves and those who are in *mancipium*, that not only can they not enter into an obligation with the

*ipsi cuius in potestate mancipiove sunt obligari non possint, sed ne alii quidem ulli.*

105. Mutum neque stipulari neque promittere posse palam est. *Quod et in surdo receptum est: quia et is qui stipulatur verba promittentis, et qui promittit, verba stipulantis exaudire debet.* (106.) Furiosus nullum negotium gerere potest, quia non intelligit quid agat. (107.) Pupillus omne negotium recte gerit: ita tamen ut tutor, sicubi tutoris auctoritas necessaria sit, adhibeatur, velut si ipse obligetur: nam alium sibi obligare etiam sine tutoris auctoritate potest. (108.) Idem iuris est in feminis quae in tutela sunt. (109.) Sed quod diximus de pupillis, utique de eo verum est qui iam aliquem intellectum habet: nam infans et qui infanti proximus est non multum a furioso differt, quia huius aetatis pupilli nullum intellectum habent: sed in his pupillis per utilitatem benignior iuris interpretatio facta est.

person in whose *potestas* or *mancipium* they are, but not even with any one else.

105. That a dumb man can neither stipulate nor promise is plain. Which is the rule also as to a deaf man: because both he who stipulates ought to hear the words of the promiser, and he who promises the words of the stipulator. 106. A madman can transact no business, because he does not understand what he is about. 107. A pupil can legally transact any business, provided that the tutor be employed in cases where the tutor's authorization is necessary, for instance, if the pupil bind himself<sup>1</sup>: for he can bind another to himself even without the authorization of the tutor<sup>2</sup>. 108. The law is the same as to women who are under *tutela*<sup>3</sup>. 109. Now what we have said regarding pupils is only true about one who has already some understanding: for an infant and one almost an infant do not differ much from a madman, because pupils of this age have no understanding: but for convenience a somewhat lenient construction of the law has been made in the case of such pupils<sup>4</sup>.

<sup>1</sup> Ulpian, XL 27.

<sup>2</sup> II. 83.

<sup>3</sup> I. 191; II. 80.

<sup>4</sup> That is, although they have little

or no understanding, their stipulations or promises backed by the tutor's authorization are binding.

110. Possumus tamen ad id quod stipulamur alium adhibere qui idem stipuletur, quem vulgo adstipulatorem vocamus. (111.) Sed huic proinde actio competit, proindeque ei recte solvitur ac nobis. sed quidquid consecutus erit, mandati iudicio nobis restituere cogetur. (112.) Ceterum potest etiam aliis verbis uti adstipulator, quam quibus nos uti sumus. itaque si verbi gratia ego ita stipulatus sim: DARI SPONDES? ille sic adstipulari potest: IDEM FIDE TUA PROMITTIS? vel IDEM FIDE IUBES? vel contra. (113.) Item minus adstipulari potest, plus non potest. itaque si ego sestertia x stipulatus sum, ille sestertia v stipulari potest; contra vero plus non potest. item si ego pure stipulatus sim, ille sub condicione stipulari potest;

110. We can, however<sup>1</sup>, make another person a party to that which we stipulate for, so as to stipulate for the same, and such an one we commonly call an *adstipulator*. 111. An action then will equally lie for him and payment can as properly be made to him as to us, but whatever he has obtained he will be compelled to deliver over to us by an *actio mandati*<sup>2</sup>. 112. But the adstipulator may even use other words than those which we use. Therefore if, for example, I have stipulated thus: Do you engage that it shall be given? He may adstipulate thus: Do you become *fidepromissor* for the same? or: Do you become *fidejussor* for the same? or *vice versa*<sup>3</sup>. 113. Likewise, he can adstipulate for less, but not for more. Therefore if I have stipulated for ten sestertia, he can (ad)stipulate for five: but he cannot do the contrary. Likewise, if I have stipulated unconditionally, he can (ad)stipulate under a condition: but he cannot do the contrary.

<sup>1</sup> "Hoc tamen respicit ad § 103." Gneist. In § 103 it is stated that no man can stipulate for the benefit of another, to which statement the doctrine of adstipulators is at first sight opposed.

The subject here discussed, viz. "De adstipulatoribus," is entirely omitted from the *Institutes* of Justinian; perhaps because one of the leading principles connected with the *adstipulatio*, viz. that a right of action should not pass to the heir of the stipulator (which in fact was one of the

chief reasons for adstipulators being employed at all) was destroyed by imperial enactment. See Cod. 4. 11. where the old rule: "Ab heredibus non incipere actiones nec contra haeredes" is especially condemned.

<sup>2</sup> III. 117, 155 et seqq.

<sup>3</sup> III. 115. We may stipulate with the principal, and the adstipulator may adstipulate with a surety (*fidepromissor* or *fidejussor*); or we may stipulate with the surety, and he stipulate with the principal.



contra vero non potest. non solum autem in quantitate, sed etiam in tempore minus et plus intelligitur: plus est enim statim aliquid dare, minus est post *tempus*. (114.) In hoc autem iure quaedam singulari iure observantur. nam adstipulatoris heres non habet actionem. item servus adstipulando nihil agit, qui ex ceteris omnibus causis stipulatione domino acquirit. idem de eo qui in mancipio est magis placuit; nam et is servi loco est. is autem qui in potestate patris est, agit aliquid, sed parenti non acquirit; *quammis* ex omnibus ceteris causis stipulando ei adquirat. ac ne ipsi quidem aliter actio competit, quam si sine capitis diminutione exierit de potestate parentis, veluti morte eius, aut quod ipse flamen Dialis inauguratus est. eadem de filia familias, et quae in manu est, dicta intelligemus

115. Pro eo quoque qui promittit solent alii obligari, quorum alios sponsores, alios fidepromissores, alios fideiussores appellamus. (116.) Sponsor ita interrogatur: IDEM DARI SPONDES?

And the more and the less are considered with reference not only to quantity but also to time<sup>1</sup>: for it is more to give a thing at once, less to give it after a time. 114. But as to this matter of law some peculiar rules are observed. For the heir of the adstipulator can bring no action<sup>2</sup>. Likewise, a slave who adstipulates effects nothing, although in all other cases he acquires for his master by stipulation<sup>3</sup>. The same is generally held with regard to one who is in *mancipium*: for he too is in the position of a slave<sup>4</sup>. But he who is in the *potestas* of his father does a valid act, but does not acquire for his ascendant: although in all other cases he acquires for him by stipulation. And an action does not even lie for him personally, unless he have passed from his ascendant's *potestas* without a *capitis diminutio*, for instance, by that ascendant's death, or because he himself has been instituted Flamen Dialis<sup>5</sup>. The same rule we shall adopt with regard to a woman in *potestas* or in *manus*.

115. For the promiser also others are frequently bound, some of whom we call *sponsores*, some *fidepromissores*, some *fidejussores*. 116. A sponsor is interrogated thus: Do you engage that the same thing shall be given? a fidepromissor:

<sup>1</sup> IV. 53.<sup>2</sup> IV. 113.<sup>3</sup> II. 87.<sup>4</sup> I. 123, 138.<sup>5</sup> I. 130.



fidepromissor : IDEM FIDEPROMITTIS? fideiussor ita : IDEM FIDE TUA ESSE IUBES? videbimus de his autem, quo nomine possint proprie adpellari, qui ita interrogantur: IDEM DABIS? IDEM PROMITTIS? IDEM FACIES? (117.) Sponsores *quidem* et fidepromissores et fideiussores saepe solemus accipere, dum curamus ut diligentius nobis cautum sit. adstipulatorem vero fere tunc solum *adhibemus*, cum ita stipulamur, ut aliquid post mortem nostram detur: *quod cum* stipulando nihil agimus, *adhibetur* adstipulator, ut is post mortem nostram agat: qui si quid fuerit consecutus, *de restituendo* eo mandati iudicio heredi *nostro* tenetur.

118. Sponsoris *vero* et fidepromissoris similis condicio *est*, fideiussoris *valde dissimilis*. (119.) Nam illi *quidem* nullis obligationibus accedere possunt nisi *verborum*; quamvis interdum ipse qui promiserit non fuerit obligatus, velut si *femina* aut pupillus sine tutoris auctoritate, aut quilibet post mortem suam dari promiserit. at illud quaeritur, si *seruus* aut peregrinus spoponderit, an pro eo sponsor aut fidepromissor obligetur.

Do you become fidepromissor for the same? a fidejussor: Do you become fidejussor for the same? But by what name those should properly be called who are interrogated thus: Will you give the same? Do you promise the same? Will you do the same? is a matter for our consideration.

117. Sponsors, fidepromissors, and fidejussors we are in the frequent habit of taking, whilst providing that we be carefully secured. But an adstipulator we scarcely ever employ save when we stipulate that something is to be given us after our death: for since we effect nothing by the stipulation<sup>1</sup>, an adstipulator is employed, that he may bring the action after our death: and if he obtain anything, he is liable to our heir upon an *actio mandati* for its delivery over<sup>2</sup>.

118. The position of a sponsor and fidepromissor is very much the same, that of a fidejussor very different. 119. For the former cannot be attached to any but verbal obligations: although sometimes the promiser himself is not bound, for instance, if a woman or a pupil have promised any thing without authorization of the tutor, or if any person have promised that something shall be given after his death. But if a slave or a foreigner have made the promise, it is questionable whether

fideiussor vero omnibus obligationibus, id est sive re sive verbis sive litteris sive consensu contractae fuerint obligationes, adici potest. at ne illud quidem interest, utrum civilis an naturalis obligatio sit cui adiciatur; adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui a servo fideiussorem accipiat, sive dominus in id quod sibi debeatur. (120.) Praeterea sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quaeramus, et alio iure civitas eius utatur: fideiussoris autem etiam heres tenetur. (121.) Item sponsor et fidepromissor *per legem Furiam* biennio liberantur; et quotquot erunt numero eo tempore quo pecunia peti potest, in tot partes deducitur inter eos obligatio, et singuli viriles partes *dare iubentur*. fideiussores vero perpetuo tenentur; et quotquot erunt numero, singuli in solidum obligantur. *itaque liberum est creditori a quo velit*

the sponsor or fidepromissor is bound for him. A fidejussor on the contrary can be attached to any obligation, *i. e.* whether it be contracted *re, verbis, litteris* or *consensu*. And it does not even matter whether it be a civil or a natural obligation to which he is attached, so that he can be bound even for a slave, whether the receiver of the fidejussor from the slave be a stranger, or the master for that which is due to him. 120<sup>1</sup>. Besides, the heir of a sponsor and fidepromissor is not bound<sup>2</sup>, unless we be considering the case of a foreign fidepromissor, and his state adopt a different rule: but the heir of a fidejussor is bound as well as himself (*etiam*). 121. Likewise, a sponsor and fidepromissor are freed from liability after two years, by the *Lex Furia*<sup>3</sup>: and whatever be their number at the time when the money can be sued for, the obligation is divided amongst them into so many parts, and each of them is ordered to pay one part. But fidejussors are bound for ever, and whatever be their number, each is bound for the whole amount<sup>4</sup>. And so it is allowable for the creditor to

<sup>1</sup> From this section it would almost appear as if the notion of a *comitas gentium* existed in Roman Jurisprudence, so as to warrant the belief that there was something like *private international law*. See III. 96.

<sup>2</sup> IV.

<sup>3</sup> B.C. 95. IV. 22.

<sup>4</sup> *En solidarité*, to use a corresponding French term. See as to bonds in solidarity upon guarantees in the French law, *The Mercantile Law of France*, by Davies and Laurent, p. 44.

*solidum petere. Sed ex epistula divi Hadriani compellitur creditor a singulis, qui modo solvendo sint, partes petere.* eo igitur distat haec epistula a lege Furia, quod si quis ex sponsoribus aut fidepromissoribus solvendo non sit, *non augetur onus ceterorum, quotquot erunt. Cum autem lex Furia tantum in Italia locum habeat, consequens est, ut in provinciis sponsores quoque et fidepromissores proinde ac fideiussores in perpetuo teneantur et singuli in solidum obligentur, nisi ex epistula divi Hadriani hi quoque adiuvari videantur.* (122.) Praeterea inter sponsores et fidepromissores lex Apuleia quandam societatem introduxit: nam si quis horum plus sua portione solverit, de eo quod amplius dederit *adversus ceteros actionem habet.* Lex autem Apuleia ante legem Furiam lata est, quo tempore in solidum obligabantur: unde quaeritur, an post legem Furiam adhuc legis Apuleiae beneficium supersit. et utique extra *Italiam* superest; nam lex quidem Furia tantum in *Italia* valet, Apuleia

demand the whole from whichever of them he may choose. But according to an epistle of the late emperor Hadrian the creditor is compelled to sue for a proportional part from each, and those only (are to be reckoned in the calculation) who are solvent. In this respect therefore this epistle differs from the Lex Furia, viz. that if any of a number of sponsors or fidepromissors be insolvent, the burden of the rest, whatever be their number, is not increased. But inasmuch as the Lex Furia is of force in Italy only, it follows that in the provinces sponsors and fidepromissors also, as well as fidejussors, are bound for ever, and each of them for the full amount, unless they too are to be considered relieved by the epistle of the late emperor Hadrian. 122. Further the Lex Apuleia<sup>1</sup> introduced a kind of partnership amongst sponsors and fidepromissors. For if any one of them have paid more than his share, he has an action against the others for that which he has given in excess. Now the Lex Apuleia was enacted before the Lex Furia, at which time they were liable in full: hence the question arises whether after the passing of the Lex Furia the benefit of the Lex Apuleia still continues. And undoubtedly it continues in places out of Italy: for the Lex Furia is only applicable in Italy, but the

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<sup>1</sup> B.C. 101.

, *Fidepromissors, Fidejussors.*

vero etiam in *ceteris praeter Italiam regionibus*. *Alia sane est fideiussorum condicio; nam ad hos lex Apuleia non pertinet.* itaque si creditor ab uno totum consecutus fuerit, huius solius detrimentum erit, scilicet si is pro quo fideiussit solvendo non sit. *sed ut ex supradictis apparet, is a quo creditor totum petit, poterit ex epistula divi Hadriani desiderare, ut pro parte in se detur actio.* (123.) Praeterea lege — — cautum est, ut is qui sponsores aut fidepromissors accipiat praedicat palam et declaret, et de qua re satis accipiat, et quot sponsores aut fidepromissors in eam obligationem accepturus sit: et nisi praedixerit, permittitur sponsoribus et fidepromissoribus intra diem xxx. praeiudicium postulare, quo quaeratur, an ex ea lege praedictum sit; et si iudicatum fuerit praedictum non esse, liberantur. Qua lege fideiussorum mentio nulla fit; sed in usu est, etiam si fideiussores accipiamus, praedicere.

Lex Apuleia in other regions also beyond Italy. The position of fidejussors is different: for the Lex Apuleia does not apply to them. Therefore, if the creditor have obtained the whole from one of them, the loss falls on this one only, supposing, that is, that he for whom he was fidejussor be insolvent. But, as appears from what was said above, he from whom the creditor demands payment in full, can, in accordance with the epistle of the late emperor Hadrian, demand that the action shall be granted against him for his share only. 123. Further by the Lex Pompeia<sup>1</sup> it is provided that he who accepts sponsors or fidepromissors shall make a public statement beforehand, and declare on what matter he is taking surety, and how many sponsors and fidepromissors he is about to take in respect of the obligation: and unless he thus make declaration beforehand, the sponsors and fidepromissors are allowed at any time within thirty days to demand a preliminary investigation<sup>2</sup>, in which the point investigated is whether prior declaration was made according to the law; and if it be decided that the declaration was not made, they are freed from liability. In this law no mention is made of fidejussors: but it is usual to make a prior declaration, even if we be accepting fidejussors.

<sup>1</sup> This is Huschke's reading. He connects the Lex Pompeia with the Uncaria Lex, spoken of by Festus in a mutilated fragment.

<sup>2</sup> IV. 44.

124. Sed beneficium legis Corneliae omnibus commune est. qua lege idem pro eodem apud eundem eodem anno vetatur in ampliorem summam obligari creditae pecuniae quam in XX milia; et quamvis sponsor vel fidepromissor in amplam pecuniam, velut si sestertium c milia se obligaverit, non tamen tenetur. Pecuniam autem creditam dicimus non solum eam quam credendi causa damus, sed omnem quam tunc, cum contrahitur obligatio, certum est debitum iri, id est quae sine ulla conditione deducitur in obligationem. itaque et ea pecunia quam in diem certum dari stipulamur eodem numero est, quia certum est eam debitum iri, licet post tempus petatur. Appellatione autem pecuniae omnes res in ea lege significantur. itaque si vinum vel frumentum, et si fundum vel hominem stipulemur, haec lex observanda est. (125.) Ex quibusdam tamen causis permittit ea lex in infinitum satis accipere, veluti si dotis nomine, vel eius quod ex testamento tibi debeatur, aut iussu iudicis satis accipiatur. et adhuc lege vicesima hereditatium cavetur,

124. The benefit of the Lex Cornelia<sup>1</sup> is common to all sureties. By this law the same man is forbidden on behalf of the same man, and to the same man, and within the same year to be bound for a greater sum of borrowed money than 20,000 sesterces; and although the sponsor or fidepromissor may have bound himself for more money, for instance for 100,000 sesterces, he will nevertheless not be liable<sup>2</sup>. By "borrowed money" we mean not only that which we give for the purpose of a loan, but all money which at the time when the obligation is contracted it is certain will become due, i. e. which is made a matter of obligation without any condition. Therefore, money also which we stipulate shall be given on a fixed day is within the category, because it is certain that it will become due, although it can be sued for only after a time. By the appellation "money" everything is intended in this law. Therefore the law is to be observed if we be stipulating for wine, or corn, or a piece of land, or a man. 125. In some cases, however, the law allows us to take surety for an unlimited amount, for instance, if surety be taken in regard to a *dos*, or for something due to you under a testament, or by order of a *iudex*. And further, it is provided by the Lex

<sup>1</sup> B.C. 81.

<sup>2</sup> Or if we take Huschke's reading, *lumtaxat XX damnatur*: "He

is not condemned to pay more than 20,000."

ut ad eas satisfationes quae ex ea lege proponuntur lex Cornelia non pertineat.

126. In eo iure quoque iuris par condicio est omnium, sponsorum, fidepromissorum, fideiussorum, quod ita obligari non possunt, *ut* plus debeant quam debet is pro quo obligantur. at ex diverso ut minus debeant, obligari possunt, sicut in adstipulatoris persona diximus. nam ut adstipulatoris, ita et horum obligatio accessio est principalis obligationis, nec plus in accessione esse potest quam in principali re. (127.) In eo quoque par omnium causa est, quod si quis pro reo solverit, eius recipiendi causa habet cum eo mandati iudicium. et hoc amplius sponsores ex lege Publilia propriam habent actionem in duplum, quae appellatur *depensi*.

128. Litteris obligatio fit veluti in *nominibus* transcripticiis. fit *autem* nomen transcripticium duplici modo, vel a re in per-

Vicesima Hereditatum<sup>1</sup> that the Lex Cornelia shall not apply to the assignments of sureties appointed in that law.

126. In the following legal incident the position of all, sponsors, fidepromissors and fidejussors, is alike, that they cannot be bound so as to owe more than he for whom they are bound owes. But on the other hand they may be bound so as to owe less, as we said in the case of the adstipulator<sup>2</sup>. For their obligation, like that of the adstipulator, is an accessory to the principal obligation, and there cannot be more in the accessory than in the principal thing. 127. In this respect also the position of all of them is the same, that if any one has paid money for the principal, he has an *actio mandati*<sup>3</sup> against him for the purpose of recovering it. And further than this, sponsors by the Lex Publilia<sup>4</sup> have an action peculiar to themselves for double the amount, which is called the *actio depensi*<sup>5</sup>.

128. An obligation *litteris* arises in the instance of *nomina transcripticia*<sup>6</sup>. A *nomen transcripticium* occurs in two ways,

<sup>1</sup> The *Lex Vicesima Hereditatum* was enacted in the reign of Augustus (A.D. 6), and laid a tax of one twentieth on all inheritances and legacies, except where the recipients were very near relations.

<sup>2</sup> III. 113.

<sup>3</sup> III. 155 et seqq.

<sup>4</sup> Who Publilius was is not cer-

tainly known. He is supposed to be named by Cicero in the *Orat. pro Cluent.* c. 45.

<sup>5</sup> The working of this action is more fully explained by Gaius in IV. 9, 22, 25.

<sup>6</sup> In order to understand the nature of this obligation it is necessary to remember that among the Romans

sonam, vel a persona in personam. (129.) *A re in personam transcriptio fit, veluti si id quod tu ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero.* (130.) *A persona in personam transcriptio fit, veluti si id quod mihi Titius debet tibi id expensum tulero, id est si Titius te delegaverit mihi.* (131.) *Alia causa est eorum nominum quae arcaria vocantur. in his enim rei, non litterarum obligatio consistit : quippe non aliter valent, quam si numerata sit pecunia ; numeratio autem pecuniae rei, non litterarum facit obligationem. qua de causa recte dicemus arcaria nomina nullam*

either from thing to person, or from person to person. 129. A transcription from thing to person takes place, for instance, if I set down to your debit what you owe me on account of a sale, a letting, or a partnership. 130. A transcription from person to person takes place if I set down to your debit what Titius owes to me, i.e. if Titius makes you his substitute to me<sup>1</sup>. 131. The case is different with those *nomina* which are called *arcaria*. For in these the obligation is one *re* not *litteris*: inasmuch as they do not stand good unless the money has been paid over ; and the paying over of money constitutes an obligation *re* not *litteris*. And therefore we should state

every master of a house kept regular accounts with great accuracy : and to be negligent in this matter was regarded as disreputable. The entries were first roughly made in day-books, called *Adversaria* or *Calendaria*, and were posted at stated periods in ledgers, called *Codices expensi et accepti*. *Nomen* was the general name for any entry, whether on the debtor or creditor side of the account. When any one keeping books entered a sum of money as received from Titius, he was said *ferre* or *referre acceptum Titio*, that is, to place it to the credit of Titius : when, on the other hand, he entered a sum as paid to Titius he was said *ferre* or *referre expensum Titio*, that is, to place it to the debit of Titius. If it could be proved that an *expensum* had been set down with the debtor's consent, the absence of a corresponding *acceptum* in the debt-

or's ledger was immaterial, as such absence only argued fraud or negligence on his part. The solemnity therefore which in this case turned a pact into a contract was an *entry with consent*. Heineccius, basing his reasoning on a passage of Theophilus, holds that a contract *litteris* is never an original contract, but always operates as a *novatio* of some precedent obligation. See Heineccii *Antiquit.* III. 28. § 4. Cic. *de Off.* III. 14.

<sup>1</sup> The case supposed is that Titius owes me, say, 100 *aurei* and you owe Titius the same amount : it simplifies matters therefore if Titius, who has to receive 100 and pay 100, remove himself from the transaction altogether by remitting your debt to him and making you, with my consent, a debtor to me in his own stead.



facere obligationem, sed obligationis factae testimonium praebere. (132.) Unde proprie dicitur arcariis nominibus etiam peregrinos obligari, quia non ipso nomine, sed numeratione pecuniae obligantur: quod genus obligationis iuris gentium est. (133.) transcripticiis vero nominibus an obligentur peregrini, merito quaeritur, quia quodammodo iuris civilis est talis obligatio: quod Nervae placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transcripticium, etiam peregrinos obligari; si vero a persona in personam, non obligari. (134.) Praeterea litterarum obligatio fieri videtur chirographis et syngrafis, id est si quis debere se aut daturum se

correctly that *nomina arcaria* effect no obligation, but afford evidence of an obligation having been entered into. 132. Hence it is rightly said that even foreigners are bound by *nomina arcaria*, because they are bound not by the entry (*nomen*) itself, but by the paying over of the money, which kind of obligation belongs to the *jus gentium*. 133. But whether foreigners are bound by *nomina transcripticia* is justly disputed, because an obligation of this kind is in a manner a creature of the civil law; and so Nerva thought. But it was the opinion of Sabinus and Cassius, that if the entry were from thing to person, even foreigners were bound: but if from person to person, they were not bound. 134. Further, an obligation *litteris* is considered to arise from chirographs and syngraphs<sup>1</sup>, i. e. if a man state in writing that he owes or will give something: provided only there be no stipulation made

<sup>1</sup> A chirograph is signed by the debtor only, a syngraph by both debtor and creditor. Chirographs and syngraphs were not mere proofs of a contract, but documents on which an action could be brought. A simple memorandum, which was good only as evidence, was termed a *cautio*. In Justinian's time *cautiones* and *chirographae* were regarded as identical; but see his regulations as to the time within which an *exceptio non numeratae pecuniae* could be brought in *Inst.* III. 21. Mühlenthal for some inexplicable reason

considers *nomina arcaria* identical with syngraphs and chirographs; although the word *praeterea* in § 134 shews pretty plainly that the two are contrasted; and this inference is corroborated by our observing that syngraphs and chirographs are said to be peculiar to foreigners, whilst as to *nomina arcaria* the remark occurs, *etiam peregrinos obligari*, the *etiam* plainly implying that these are *not* peculiar to foreigners and therefore are something different from syngraphs and chirographs.



scribat; ita scilicet, si eo nomine stipulatio non fiat. quod genus obligationis proprium peregrinorum est.

135. Consensu fiunt obligationes in emptionibus et venditionibus, locationibus conductionibus, societatibus, mandatis. (136.) Ideo autem istis modis consensu dicimus obligationes contrahi, quia neque verborum neque scripturae ulla proprietas desideratur, sed sufficit eos qui negotium gerunt consensisse. unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per internuntium, cum alioquin verborum obligatio inter absentes fieri non possit. (137.) Item in his contractibus alter alteri obligatur de eo quod alterum alteri ex bono et aequo praestare oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat, et in nominibus alius expensum ferendo obliget, alius obligetur. (138.) Sed

regarding the matter<sup>1</sup>. This kind of obligation is peculiar to foreigners.

135. Obligations arise from consent in the cases of buying and selling, letting and hiring, partnerships and mandates. 136. And the reason for our saying that in these cases obligations are contracted by consent is that no peculiar form either of words or of writing is required, but it is enough if those who are transacting the business have come to agreement. Therefore, such matters are contracted even between persons at a distance from one another, for example, by letter or messenger, whilst on the other hand a verbal obligation cannot arise between persons who are apart. 137. Likewise, in these contracts the one is bound to the other for all that the one ought in fairness and equity to afford to the other, whilst, on the other hand, in verbal obligations one stipulates and the other promises, and in literal obligations one binds by an entry to the debit and the other is bound<sup>2</sup>. 138. But an

<sup>1</sup> If there be, the obligation is *in ius*, and the document becomes a *tabula*, not absolutely conclusive, but only available as evidence.

<sup>2</sup> The old contracts based on the civil law were unilateral, the new contracts by consent, springing from the *jus gentium*, were bilateral. It will be observed that Gaius says nothing here about real contracts. Pos-

sibly this is because their position was anomalous: they had been unilateral, but under the growing influence of the *jus gentium* were becoming bilateral, as is implied in the concluding words of III. 133 above. Mackeldey (*Syst. Jur. Rom.* p. 343) divides obligations *ex contractu* into two classes, *obligationes naturales* and *obligationes civiles*, the former giving

absenti expensum ferri potest, etsi verbis obligatio cum absente contrahi non possit.

139. *Emptio et venditio contrahitur* cum de pretio convenerit, quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit. nam quod arrae nomine datur argumentum est emptionis et venditionis contractae.

140. Pretium autem certum esse debet: alioquin si ita inter eos convenerit, ut quanti Titius rem aestimaverit, tanti sit empti, Labeo negavit ullam vim hoc negotium habere; *quam sententiam* Cassius probat: Ofilius et eam emptionem putat et venditionem; cuius opinionem Proculus secutus est.

141. *Item* pretium in numerata pecunia consistere debet. nam in ceteris rebus an pretium esse possit, veluti homo aut

entry may be made to the debit of an absent person, although a verbal obligation cannot be entered into with an absent person.

139. A contract of buying and selling is entered into as soon as agreement is made about the price, even though the price have not yet been paid, nor even earnest given. For what is given as earnest is only evidence of a contract of buying and selling having been entered into<sup>1</sup>.

140. Further, the price ought to be fixed: if, on the contrary, they agree that the thing shall be bought for such price as Titius shall value it at, Labeo says such a transaction has no validity, and Cassius agrees with his opinion: but Ofilius says there is a buying and selling, and Proculus follows his opinion<sup>2</sup>.

141. Likewise the price must consist of coined money. For whether the price can consist of other things, for instance, whether a slave, or a garment, or a piece of land can be the

rise to an exception only, and not to a direct action, the latter provided with an action. These *obligationes civiles* again split up into two subdivisions, viz. *obligationes civiles (sensu stricto)* and *obligationes praetoriae*: civil obligations (in the strict sense) are of two kinds, (a) those alien from natural law and founded on the strictest civil law, e. g. *stipulationes* and *nomina*, (b) those called *jure civili* i. e. received from the

*jus gentium* into the civil law and therein protected by an action; to this last species he relegates all real and consensual contracts, and all the *pacta legitima* and *praetoria* of later jurisprudence.

<sup>1</sup> That is, is not of the essence of the contract.

<sup>2</sup> Justinian settled this dispute. If the referee fixed the price, the sale was valid; if he could not or would not, the agreement was void.

toga aut fundus alterius rei *pretium esse possit*, valde quaeritur. nostri praeceptores putant etiam in alia re posse consistere pretium; unde illud est quod vulgo putant per permutationem rerum emptionem et venditionem contrahi, eamque speciem emptionis et venditionis vetustissimam esse; argumentoque utuntur Graeco poeta Homero qui aliqua parte sic ait:

ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,  
 "Ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἶθωνι σιδήρῳ,  
 "Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσιν,  
 "Ἄλλοι δ' αἰ

Diversae scholae auctores dissentiunt, aliudque esse existimant permutationem rerum, aliud emptionem et venditionem: alioquin *non posse* rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse; sed rursus utramque videri et venisse et utramque pretii nomine datam esse absurdum videri. Sed ait Caelius Sabinus, si rem Titio venalem habente, veluti fundum, acceperim, et pretii nomine hominem

price of another thing, is very doubtful. Our authorities think the price may consist of some other thing; and hence comes the vulgar notion, that by the exchange of things a buying and selling is effected, and that this species of buying and selling is the most ancient: and they bring forward as an authority the Greek poet Homer, who in a certain passage says thus: "Thereupon then the long-haired Achæans obtained wine, some for brass, some for glittering steel, some for skins of cattle, some for cattle themselves, some for slaves!" The authorities of the other school take a different view, and think that exchange of things is one matter, buying and selling another: otherwise, they say, it could not be made clear when things were exchanged which thing was to be considered sold, and which given as a price: but again, for both to be considered to be at once sold, and also both given as the price, appears ridiculous. But Caelius Sabinus says, if when Titius has a thing for sale, for instance a piece of land, I take it, and give a slave, say, for the price; the land is to be regarded as sold, and the

## *Locatio et Conductio.*

forte dederim, fundum quidem videri venisse, hominem autem pretii nomine datum esse, *ut* fundus acciperetur.

142. Locatio autem et conductio similibus regulis constituntur: nisi enim merces certa statuta sit, non videtur locatio et conductio contrahi. (143.) unde si alieno arbitrio merces permessa sit, velut quanti Titius aestimaverit, quaeritur an locatio et conductio contrahatur. qua de causa si fulloni polienda curandave, sarcinatori sarcienda vestimenta dederim, nulla statim mercede constituta, postea tantum daturus quanti inter nos convenerit, quaeritur an locatio et conductio contrahatur; (144.) vel si rem tibi utendam dederim et invicem aliam rem utendam acceperim, quaeritur an locatio et conductio contrahatur.

slave to be given as the price in order that the land may be received<sup>1</sup>.

142. Letting and hiring is regulated by similar rules: for unless a fixed hire be determined, no letting and hiring is considered to be contracted. 143. Therefore, if the hire be left to the decision of another, such amount, for example, as Titius shall think right, it is disputed whether a letting and hiring is contracted. Wherefore, if I give garments to a fuller to be smoothed and cleaned, or to a tailor to be repaired, no hire being settled at the time, my intention being to give afterwards what shall be agreed upon between us, it is disputed whether a letting and hiring is contracted<sup>2</sup>. 144. Or if I give a thing to you to be used, and in return receive from you another thing to be used, it is disputed whether a letting and hiring is contracted<sup>3</sup>.

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<sup>1</sup> This is not a mere dispute about words, like so many of the points debated between the Sabinians and Proculians. The old Roman Law regarded exchange as a real contract, therefore a mere agreement to exchange was not binding, and the exchange could only be enforced in case one of the parties had delivered up the thing which he was to part with: but if the Sabinians could have been victorious in their argument, and got the lawyers to admit that an exchange was a sale, exchange would have be-

come a consensual contract, and a mere agreement to exchange have been binding.

<sup>2</sup> The contract is not *locatio conductio* for want of a *merces* specified beforehand; it is not *mandatum* because it is not gratuitous, there being an implication that a *merces* will eventually be paid: hence the remedy can only be an *actio praescriptis verbis*; for an account of which see Sanders' *Justinian*, p. 413.

<sup>3</sup> The contract in this case is one of the innominate real contracts—

145. Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat utrum emptio et venditio contrahatur, an locatio et conductio. veluti si qua res in perpetuum locata sit, quod evenit in praediis municipum quae ea lege locantur, ut quamdiu id vectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur; sed magis placuit locationem conductionemque esse.

146. Item si gladiatores ea lege tibi tradiderim, ut in singulos qui integri exierint pro sudore denarii xx mihi darentur, in eos vero singulos qui occisi aut debilitati fuerint, denarii mille :

145. But buying and selling and letting and hiring have so close a resemblance to one another, that in some cases it is a matter of question whether a buying and selling is contracted or a letting and hiring<sup>1</sup>; for instance, if a thing be let for ever, which happens with the lands of corporations which are let out on condition that so long as so much rent be paid, the land shall not be taken away either from the hirer himself or his heir; but it is the general opinion that this is a letting and hiring<sup>2</sup>.

146. Likewise, if I have delivered gladiators to you on condition that for each one who escapes unhurt 20 *denarii* shall be given to me for his exertions, but for each of those who are killed or wounded 1000 *denarii*: it is disputed whether

—therefore is only binding when one party has completed his delivery, and not on mere consent. The matter here noticed is very fully discussed in Jones, *On Bailments*, p. 93.

<sup>1</sup> D. 19. 2. 2. 1.

<sup>2</sup> This *locatio in perpetuum* or *emphyteusis* was by Justinian made a distinct kind of contract, subject to rules of its own. See *Inst.* III. 24. 3, and the notes on pp. 214, 215 of Sandars' edition of the *Institutes*. Also read Savigny, *On Possession*, pp. 77—79; D. 6. 3.

From these authorities and others we learn that *emphyteusis* was a comparatively modern contract, a lease of lands by a private individual or

corporation to a private individual; whereas the older *ager vectigalis* was always a lease proceeding from a corporation. The leases of *agri vectigales* were not always perpetual, but sometimes for a term of years. The emphyteutic leases made by a private individual were always hereditary. Hence they were closely analogous to the *fee farms* mentioned by Britton (see Nichols' translation of Britton, fol. 164), which were lands held in fee for an annual rent reserved at the time of their grant; being therefore a species of socage. In Cicero's time lands leased by corporations, whether for years or in perpetuity, were called *agri fructuarii*.

quaeritur utrum emptio et venditio, an locatio et conductio contrahatur. et magis placuit eorum qui integri exierint locationem et conductionem contractam videri, at eorum qui occisi aut debilitati sunt emptionem et venditionem esse: idque ex accidentibus apparet, tamquam sub condicione facta cuiusque venditione aut locatione. iam enim non dubitatur, quin sub condicione res veniri aut locari possint. (147.) Item quaeritur, si cum aurifice mihi convenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperet verbi gratia denarios CC, utrum emptio et venditio, an locatio et conductio contrahatur. Cassius ait materiae quidem emptionem et venditionem contrahi, operarum autem locationem et conductionem. sed plerisque placuit emptionem et venditionem contrahi. atqui si meum aurum ei dederò, mercede pro opera constituta, convenit locationem et conductionem contrahi.

148. Societatem coire solemus aut totorum bonorum, aut unius alicuius negotii, veluti mancipiorum emendorum aut vendendorum.

a buying and selling or a letting and hiring is contracted. And the general opinion is that there seems to be a letting and hiring contracted of those who escaped unhurt, but a buying and selling of those who were killed or wounded: and that this is made evident by the result, the selling or letting of each being made as it were under condition. For there is now no doubt that things can be sold or let under a condition<sup>1</sup>. 147. Likewise<sup>2</sup>, this question is raised, supposing an agreement has been made by me with a goldsmith, that he should make rings for me from his own gold, of a certain weight and certain form, and receive, for example, 200 denarii, whether is a buying and selling or a letting and hiring contracted? Cassius says that a buying and selling of the material is contracted, and a letting and hiring of the workmanship. But most authors think that it is a buying and selling which is contracted. But if I give him my own gold, a hire being agreed upon for the work, it is allowed that a letting and hiring is contracted<sup>3</sup>.

148. We are accustomed to enter into a partnership either as to all our property, or as to one particular matter, for instance, the purchase or sale of slaves.

<sup>1</sup> D. 19. 2. 20. pr.

<sup>2</sup> D. 19. 2. 2. 1.

<sup>3</sup> D. 18. 1. 20 and D. 18. 1. 65.

149. Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Quintus Mucius etiam *contra naturam societatis esse censuit*; sed Servius Sulpicius, cuius praevaluit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa videatur, ut aequum sit eum cum hac pactione in societatem admitti. nam et ita posse coire societatem constat, ut unus pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia valet. (150.) Et illud certum est, si de partibus lucri et damni nihil inter eos convenerit, tamen aequis ex partibus commodum et incommodum inter eos commune esse. sed si in altero partes expressae fuerint velut in

149. But it has been a much disputed question whether a partnership can be entered into, so that one of the partners shall have a larger share of the gain and pay a smaller share of the loss'. This Quintus Mucius says is in fact irreconcilable with the nature of partnership: but Servius Sulpicius, whose opinion has prevailed, thought that a partnership of this kind could so undoubtedly be entered into, that he affirmed one could also be entered into on terms that one of the parties should pay no portion whatever of the loss, and yet take a part of the gain, provided his services appeared so valuable that it was fair that he should be admitted into the partnership on this arrangement. For it is undoubtedly possible to enter into a partnership on these terms, that one shall contribute money, and the other none, and yet the gain be common between them: for frequently the services of one are as valuable as money. 150. And this too is certain, that if there have been no agreement between them as to the shares of gain and loss, yet the gain and loss must be divided between them in equal portions. But if the portions have been specified with

<sup>1</sup> D. 17. 2. 30. Servius in this passage assents to the doctrine of Mucius, holding that Mucius meant that there could not be a different apportionment of loss on the bad transactions and of good on those successful. Servius then goes on to as Gaius says, that if Mucius

had meant that there could not be a different apportionment of gain or loss on a balance of accounts he would have been wrong; but as he never implies that Mucius held such a view, Gaius is, as it seems to us, giving an unfair account of Mucius' rule in the present passage.



## *Societas.*

lucro, in altero vero omissae, in eo quoque quod omissum est similes partes erunt.

151. Manet autem societas eousque, donec in eodem sensu perseverant ; at cum aliquis renuntiaverit societati, societas solvitur. sed plane si quis in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrifaciat, cogetur hoc lucrum communicare. si quid vero aliud<sup>1</sup> lucri fecerit quod non captaverit, ad ipsum solum pertinet. mihi vero, quidquid omnino post renuntiatam societatem acquiritur, soli conceditur. (152.) Solvitur adhuc societas etiam morte socii ; quia qui societatem *contrahit* certam personam sibi eligit. (153.) Dicitur et capitis diminutione solvi societatem, quia civili ratione capitis diminutio morti *aequiparari* dicitur : sed si adhuc con-

regard to the one case, as for instance, with regard to the gain, and not mentioned with regard to the other, the portions will be the same as to that of which mention was omitted.

151. A partnership continues so long as the partners remain in the same mind : but when any one of them has renounced the partnership, the partnership is dissolved<sup>1</sup>. But, certainly, if a man renounce a partnership for the purpose of enjoying alone some anticipated gain, for instance, if my partner in all property, when left heir by some one, renounce the partnership that he may alone have the benefit of the inheritance, he will be compelled to share this gain. If, on the other hand, he chance upon some gain which he did not aim at obtaining, this belongs to him solely. But whatever is acquired from any source after the renunciation of the partnership, is granted to me alone. 152. Further, a partnership is dissolved by the death of a partner, because he who makes a contract of partnership selects for himself a definite person. 153. It is said that a partnership is also dissolved by a *capitis diminutio*<sup>2</sup>, because on the principles of the civil law a *capitis diminutio* is held to be equivalent to death : but if the partners consent

<sup>1</sup> Therefore if three men be in partnership and one renounce, the remaining two are no longer partners.

<sup>2</sup> I. 128 ; III. 101.



sentiant in societatem, nova videtur incipere societas. (154.) Item si cuius ex sociis bona publice aut privatim venierint, solvitur societas. sed hoc quoque casu societas de qua loquimur nova consensu contrahitur nudo; iuris enim gentium obligationes contrahere omnes homines naturali ratione possunt.

155. Mandatum consistit sive nostra gratia mandemus sive aliena, id est sive ut mea negotia geras, sive ut alterius mandem tibi, erit inter nos obligatio, et invicem alter alteri tenebimur, ideoque iudicium erit in id quod paret te mihi bona fide praestare oportere. (156.) nam si tua gratia tibi mandem, supervacuum est mandatum; quod enim tu tua gratia facturum sis, id ex tua sententia, non ex meo mandatu facere videberis: itaque si otiosam pecuniam domi te habere mihi dixeris, et ego te hortatus fuerim, ut eam fenerares, quamvis eam ei mutuam dederis a quo servare non potueris, non tamen habebis mecum

to be partners still, a new partnership is considered to arise. 154. Likewise, if the goods of any one of the partners be sold publicly or privately<sup>1</sup>, the partnership is dissolved. But in this case also, the partnership about which we are speaking is contracted afresh by mere consent, for, any man can contract *iuris gentium* obligations in a natural manner (i. e. without formalities).

155. A mandate arises, whether we give a commission for our own benefit or for another person's; i.e. whether I give you a commission to transact my business or that of another person there will be an obligation between us, and we shall be mutually bound one to the other, and so an action will lie for "that which it appears you ought in good faith to afford to me."

156. But if I give you a commission for your own benefit, the mandate is superfluous: for what you would do for your own sake, you are considered to do of your own accord and not on my mandate: therefore, if you tell me that you have money lying idle at home, and I advise you to put it out at interest, even if you give it on loan to one from whom you cannot recover it, you will nevertheless have no action of mandate against me. Likewise, if I advise you to buy something or other, even if it be not to your advantage that you made the purchase, I still shall not be answerable to you in an action of

## *Mandatum.*

*i actionem. item et si hortatus sim, ut rem aliquam emereres, quamvis non expedierit tibi eam emisse, non tamen mandati tibi tenebor.* et adeo haec ita sunt, ut quaeratur an mandati teneatur qui mandavit tibi, ut *Titio pecuniam fenerares* [*desunt 2½ lin.*], quia non aliter Titio credidisses, quam si tibi mandatum esset.

157. Illud constat, si faciendum quid mandetur quod contra bonos mores est, non contrahi obligationem, velut si tibi mandem, ut Titio furtum aut iniuriam facias.

158. Item si quid post mortem meam faciendum mihi mandetur, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse.

159. Sed recte quoque consummatum mandatum, si dum adhuc integra res sit revocatum fuerit, evanescit. (160.) Item si adhuc integro mandato mors alterutrius alicuius interveniat, id est vel eius qui mandarit, vel eius qui mandatum suscepit,

mandate. And this rule is so universally true, that it is a disputed point whether a man is liable to you for mandate who gave you a mandate to lend money on interest to 'Titius' .....for you would not have lent the money to Titius, unless the mandate had been given to you.

157. It is certain that if a mandate be given for the doing of something contrary to morality, no obligation is contracted; for instance, if I give you a mandate to commit a theft or injury upon Titius.

158. Likewise, if a mandate be given me for the doing of something after my death, the mandate is void, because it is an universal rule that an obligation cannot begin to operate in the person of one's heir<sup>1</sup>.

159. Even if a mandate be duly completed, yet if it be recalled before the subject of it has been dealt with, it becomes void. 160. Likewise, if the death of either of the parties occur before the execution of the mandate is commenced, that is, either the death of him who gave the mandate,

<sup>1</sup> By comparing this passage with III. 26. 6, we see that the *acuna* may be filled up: "but it has been decided (according to Sabinus'

view) that such an one is liable if his mandate be to lend to a particular person, as to Titius; for &c." <sup>2</sup> III. 100.

solvitur mandatum. sed utilitatis causa receptum est, ut si mortuo eo qui mihi mandaverit, ignorans eum decessisse executus fuero mandatum, posse me agere mandati actione: alioquin iusta et probabilis ignorantia damnum mihi adferet. et huic simile est quod plerisque placuit, si debitor meus manumisso dispensatori meo per ignorantiam solverit, liberari eum: cum alioquin stricta iuris ratione non posset liberari eo quod alii solvisset quam cui solvere deberet.

161. Cum autem is cui recte mandaverim egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest implere eum mandatum, si modo implere potuerit: at ille mecum agere non potest. itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis C emeres,

or of him who undertook it, the mandate is made null. But for convenience the rule has been adopted, that if after the death of the mandator, I, being ignorant that he is dead, carry out the mandate, I can bring an action of mandate: otherwise, a justifiable ignorance, very likely to occur, would bring loss upon me. Similar to this is the rule generally maintained, that if my debtor make a payment by mistake to my steward after I have manumitted him, he is free from his debt: although, on the other hand, by strict rule of law, he could not be free, because he had paid a person other than him whom he ought to have paid<sup>1</sup>.

161. When a man to whom I have given a mandate in proper form has transgressed its terms, I have an action of mandate against him for an amount equal to the interest I have that he should have performed the mandate, provided only he could have performed it: but he has no action against me. Thus, if I have given you a mandate to buy me a piece of land, say for a hundred thousand sesterces, and you have

<sup>1</sup> Payment to a slave is payment to the master, for the slave has no independent *persona*: also the master, having made the slave his steward, thereby authorized strangers to pay money to him; and therefore, if the slave appropriated the money, the master had to bear the loss. After the manumission the slave has an independent *persona*, and cannot

be *dispensator* any longer, that being an office tenable only by one of the *familia*. By strict law therefore the debtor's payment is void, for it is to a wrong person; but equity will not allow the debtor to suffer, if he be without notice. The same difficulty would arise if the slave were deprived of his stewardship without being emancipated.

tu *sestertiis* CL emeris, non habebis mecum mandati actionem, etiamsi tanti velis mihi dare fundum quanti emendum tibi mandassem. idque maxime Sabino et Cassio placuit. Quodsi minoris emeris, habebis mecum scilicet actionem, quia qui mandat ut C milibus emeretur, is utique mandare intelligitur, ut minoris, si posset, emeretur.

162. In summa sciendum est, *quotiens faciendum* aliquid gratis dederim, quo nomine si mercedem statuissem, locatio et conductio contraheretur, mandati esse actionem, veluti si ful-  
loni polienda curandave vestimenta aut sarcinatori sarcienda dederim.

163. Expositis generibus obligationum quae ex contractu nascuntur, admonendi sumus adquiri nobis non solum per nosmet ipsos, sed etiam per eas personas quae in nostra potestate manu mancipiove sunt. (164.) Per liberos quoque ho-  
bought it for a hundred and fifty thousand sesterces, you will have no action of mandate against me, even though you be willing to give me the land for the price at which I commissioned you to buy it. And this was decidedly the opinion of Sabinus and Cassius. But if you have bought it for a smaller price, you will doubtless have an action against me, because when a man gives a mandate for a thing to be bought for a hundred thousand sesterces, it is considered obvious that he gives the mandate for its purchase at a lower price, if possible.

162. Finally, we must observe that whenever I give any thing to be done gratuitously, as to which there would have been a contract of letting and hiring, had I settled a hire, an action for mandate lies; for instance, if I give garments to a fuller to be smoothed and cleaned, or to a tailor to be repaired<sup>1</sup>.

163. Now that the various kinds of obligations which arise from contract have been set out in order, we must take notice that acquisition can be made for us not only by ourselves, but also by those persons whom we have in our *potestas*, *manus*, or *mancipium*<sup>2</sup>. 164. Acquisition is also made for us by means of

<sup>1</sup> Although there could be no payment in the case of a mandate, yet on the completion of the work, the fuller or tailor, to take the example in the text, had a claim enforceable by action for his expenses and loss of

time, and the liberal construction of the amount of these always made in a *bonae fidei* action would ensure the workman a due recompense.

<sup>2</sup> II. 86.

mines et alienos servos quos bona fide possidemus acquiritur nobis; sed tantum ex duabus causis, id est si quid ex operis suis vel ex re nostra adquirant. (165.) Per eum quoque servum in quo usumfructum habemus similiter ex duabus istis causis nobis acquiritur. (166.) Sed qui nudum ius Quiritium in servo habet, licet dominus sit, minus tamen iuris in ea re habere intelligitur quam usufructuarius et bonae fidei possessor. nam placet ex nulla causa ei adquiri posse: adeo ut etsi nominatim ei dari stipulatus fuerit servus, mancipiove nomine eius acceperit, quidam existiment nihil ei adquiri.

167. Communem servum pro dominica parte dominis adquirere certum est, excepto eo, quod uni nominatim stipulando aut mancipio accipiendo illi soli acquirit, veluti cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IURE QUIRITUM LUCII TITII DOMINI MEI ESSE AIO, EAQUE EI EMPTA ESTO HOC AERE AENEA-

free men and the slaves of other people whom we possess in good faith: but only in two cases, viz. if they acquire any thing by their own work or from our substance<sup>1</sup>. 165. Acquisition is also in like manner made for us in these two cases by a slave in whom we have the usufruct<sup>2</sup>. 166. But he who has the mere *jus Quiritium* in a slave, although he is owner, yet is considered to have less right in this respect than an usufructuary or possessor in good faith<sup>3</sup>. For it is ruled that the slave can in no case acquire for him: so that even though the slave have expressly stipulated for a thing to be given to him, or have received it in *mancipium* in his name, some think no acquisition is made for him.

167. A slave held in common undoubtedly acquires for his owners according to their shares of ownership, with the exception that by stipulating or receiving in *mancipium* for one expressly he makes acquisition for that one only, for instance, when he stipulates thus: Do you engage that it shall be given to my master Titius? or when he receives in *mancipium*, thus: I assert this thing to be the property *ex jure Quiritium* of my master Lucius Titius; and be it bought for

<sup>1</sup> II. 91.<sup>2</sup> II. 88. Ulp. XIX. 20.

### *Solutio. Acceptilatio.*

QUE LIBRA. (167 a.) Illud quaeritur *num* quod *unius* domini nomen adiectum efficit, idem faciat unius ex dominis iussum intercedens. nostri praeceptores perinde ei qui iusserit soli adquiri existimant, atque si nominatim ei soli stipulatus esset servus, mancipiove accepisset. diversae scholae auctores proinde utrisque adquiri putant, ac si nullius iussum intervenisset.

168. Tollitur autem obligatio praecipue solutione eius quod debeatur. unde quaeritur, si quis consentiente creditore alius pro alio solverit, utrum ipso iure liberetur, quod nostris praeceptoribus placet: an ipso iure maneat obligatus, sed adversus petentem exceptione doli mali defendi debeat, quod diversae scholae auctoribus visum est.

169. Item per acceptilationem tollitur obligatio. acceptilatio autem est veluti imaginaria solutio. quod enim ex verborum obligatione tibi debeam, id si velis mihi remittere, poterit sic

him with this coin and copper balance. 167 a. It is questionable whether the fact of a command having been given by one particular master has the same effect as the addition (*i.e.* mention on the part of the slave) of the name of one particular master. Our authorities think the acquisition is made for that one only who gave the command, just as it would be if the slave stipulated or received in *mancipium* for him alone. The authorities of the other school think that acquisition is made for both masters, just as if no command had preceded<sup>1</sup>.

168. An obligation is generally dissolved by payment of that which is owed. Whence arises the question, whether a man by paying one thing instead of another with consent of the creditor is free by the letter of the law, as our authorities think: or remains bound according to the letter of the law, and must be defended against a plaintiff by an exception of fraud, which is the view upheld by the authorities of the opposite school<sup>2</sup>.

169. An obligation is also dissolved by *acceptilation*. Acceptilation is, as it were, a fictitious payment. For if you wish to remit to me what I owe you on a verbal obligation, this can

<sup>1</sup> Justinian decided in favour of the Sabinians, "*nostri praeceptores*," both this dispute and that mentioned in the next paragraph.  
<sup>2</sup> For *exceptio* see IV. 115

feri, ut patiaris haec verba *me* dicere : QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM? et tu respondeas : HABEO. (170.) Quo genere, ut diximus, *tantum hae obligationes solvuntur quae ex verbis consistunt*, non etiam ceterae: consentaneum enim visum est verbis factam obligationem posse aliis verbis dissolvi. *sed* et id quod ex alia causa debeatur potest in stipulationem deduci et per acceptilationem imaginaria solutione *dissolvi*. (171.) Tamen mulier sine tutoris auctore acceptum facere non potest; cum alioquin solvi ei sine tutoris auctoritate possit. (172.) Item quod debetur pro parte recte solvi *intelligitur*: an autem in partem acceptum fieri *possit, quaesitum* est.

173. *Est* etiam alia species imaginariae solutionis per aes et libram. quod et ipsum genus certis in causis receptum est, veluti si quid eo nomine debeatur quod per aes et libram gestum est, sive quid ex iudicati causa *debetur*. (174.) *Ad-*

be done by your allowing me to say these words: Do you acknowledge as received that which I promised to you? and by your replying: I do. 170. By this process, as we have said, only verbal obligations can be dissolved, and not the other kinds: for it seemed reasonable that an obligation made by words should be capable of being dissolved by other words. But that also which is due on other grounds can be converted into a stipulation<sup>1</sup>, and dissolved by a fictitious payment in the way of acceptilation. 171. A woman, however, cannot give an acceptilation without the authorization of her tutor, although, on the contrary, an (actual) payment can be made to her without his authorization<sup>2</sup>. 172. Likewise, it is allowed that the part-payment of a debt is valid, but it is a moot point whether there can be an acceptilation in part.

173. There is also another mode of fictitious payment, that by coin and balance<sup>3</sup>: a form which is adopted in certain cases, as for instance, when the debt is due on a transaction effected by coin and balance, or when it is due by reason of a judgment. 174. Not less than five witnesses and a

<sup>1</sup> The form of words by which this was done is to be found in Justinian, III. 29. 2, and is there called the Aquilian stipulation. The inventor, Aquilius Gallus, was a contemporary of Cicero. The Aquilian

stipulation acted as a novation. See § 176 below.

<sup>2</sup> II. 84.

<sup>3</sup> An instance of actual *per aes et libram* is to be found in Livy, VI. 14.



### *Fictitious payment per aes et*

hibentur autem non minus quam quinque testes et libripens. deinde is qui liberatur ita oportet loquatur: QUOD EGO TIBI TOT MILIBUS EO NOMINE JURE NEXI SUM DAMNAS SOLVO LIBERIQUE HOC AERE AENEAQUE LIBRA. HANC UBI LIBRAM PRIMAM POSTREMAM FERII NIHIL DE LEGE JURE OBLIGATUR. deinde asse percutit libram, cumque dat ei a quo liberatur, veluti solvendi causa. (175.) Similiter legatarius heredem eodem modo liberat de legato quod per damnationem relictum est, ut tamen scilicet, sicut iudicatus sententia se damnatum esse significat, ita heres defuncti iudicio damnatum se esse dicat. de eo tamen tantum potest hoc modo liberari quod pondere, numero constet;

*libripens* are called together<sup>1</sup>. Then the man who is to be freed from his obligation must speak thus: Inasmuch as I am bound to you by reason of *nexum*<sup>2</sup> for so many thousand sesterces on such and such a transaction, I pay (you) and free (myself) by means of this coin and copper balance. Now<sup>3</sup> that I have struck this balance for the first and last time (*i.e.* once for all), there is no legal obligation by virtue of the terms (*lege*) (of our former bargain). Then he strikes the balance with the coin, and gives it to the person from whose claim he is being freed, as though by way of payment. 175. In like manner does a legatee acquit the heir from a legacy left by damnation<sup>4</sup>, provided only that in like manner as a judgment-debtor admits himself bound by the sentence of the court, so must the heir of the deceased admit himself to be bound by a judgment<sup>5</sup>. But an acquittance in this form can only be given when the thing owed is a matter of weight or

<sup>1</sup> l. 119.

<sup>2</sup> *Jure nexi sum damnas* is a reading suggested by Huschke, who has subsequently stated his preference for *velut lege mancipii sum damnas*. The mention of *nexum*, however, agrees very well with what is said in the preceding paragraph, that a contract solemnized *per aes et libram* is dissolved by the same process, for as Cicero tells us (*De Orat.* iii. 40), "*nexum est quod per libram agitur.*" See also Festus *sub verb.*

<sup>3</sup> We have adopted Lachmann's emendation *ubi*, instead of *tibi*, the

more usual reading; and with him have supplied *nilil* before *de lege*. See the phrase *prima postremaque* in a form of treaty given by Livy (l. 24).

<sup>4</sup> II. 201.

<sup>5</sup> Before the fiction of payment can be allowed to take place, there must be an admission of a debt by judgment (equally a fiction); since a legacy is not properly one of the obligations admitting of acceptilation *per aes et libram*, as we see from § 173.



et ita, si certum sit, quidam et de eo quod mensura constat *intelligendum* existimant.

176. Praeterea novatione tollitur obligatio, veluti si quod tu mihi debeas a Titio dari stipulatus sim. nam interventu novae personae nova nascitur obligatio, et prima tollitur translata in posteriorem: adeo ut interdum, licet posterior stipulatio inutilis sit, tamen prima novationis iure tollatur. veluti si quod mihi debes a Titio post mortem eius, vel a muliere pupillove sine tutoris auctoritate stipulatus fuero. quo casu rem amitto: nam et prior debitor liberatur, et posterior obligatio nulla est. non idem iuris est, si a servo stipulatus fuero: nam tunc proinde adhuc obligatus tenetur, ac si postea a nullo stipulatus fuissem. (177.) Sed si eadem persona sit a qua postea stipuler, ita

number: although some think it may be applied also to a thing which is a matter of measure, provided the thing be definite.

176. An obligation is also dissolved by *novation*, for instance, if I stipulate with Titius that what you owe me shall be given me by him. For by the introduction of a new person a new obligation arises, and the original one is dissolved by being transferred into the later one: so that, sometimes, although the later stipulation be void, yet the original one is dissolved by reason of the novation<sup>1</sup>; for example, if I stipulate with Titius for payment by him after his death of what you owe me<sup>2</sup>, or with a woman or a pupil without the authorization of the tutor. In such a case I lose the thing, for the original debtor is set free, and the later obligation is null. But the rule is not the same if I stipulate with a slave, for then (the original debtor) is held bound, just as though I had not subsequently stipulated with any one. 177. If the person with whom I make the second stipulation be the same as

<sup>1</sup> The contract superseded in a novation might be of any kind, real, verbal, literal, or consensual, but that by which it was superseded was always a stipulation: the original contract further might be natural, civil, or praetorian, and the superseding contract too might be binding either civilly or naturally. These points are clearly laid down by Ul-

plan, see D. 46. 2. 1. 2. The obligation entered into by a pupil is binding naturally, therefore supersedes the original contract, but will not be enforced by the civil law: that entered into by a slave is not binding either naturally or civilly, therefore causes no novation, and the old contract remains effective.

<sup>2</sup> III. 100.

### *Novatio under condition.*

demum novatio fit, si quid in posteriore stipulatione novi sit, forte si condicio vel sponsor aut dies adiciatur aut *detrahatur*. (178.) Sed quod de sponsore dixi, non constat. nam diversae scholae auctoribus placuit nihil ad novationem proficere sponsoris adiectionem aut detractionem. (179.) Quod autem diximus, si condicio adiciatur, novationem fieri, sic intelligi *oportet*, ut ita dicamus factam novationem, si condicio extiterit: alioquin, si defecerit, durat prior obligatio. sed videamus, num is

before there is a novation only in case there be something new in the later stipulation; for instance, if a condition, or a sponsor<sup>1</sup>, or a day (of payment) be inserted or omitted. 178. But what I have said about the sponsor is not universally admitted; for the authorities of the other school think the insertion or omission of a sponsor has not the effect of causing a novation. 179. Also our assertion that a novation takes place if a condition be inserted must be thus understood, that we mean a novation takes place if the condition come to pass: if on the contrary it fail, the original obligation stands good<sup>2</sup>. But the point we have to consider is whether he

<sup>1</sup> III. 115.

<sup>2</sup> III. 179. This passage is at first sight confused, but it may be thus interpreted. Supposing a new condition to be inserted, the question arises, whether is there an immediate novation or a novation conditional? If there be an immediate novation, the old agreement is swept away altogether, and the new agreement is only to be carried out on fulfilment of the condition; so that if the condition fail, the promisee will get nothing at all. This view Gaius at once discards. The novation is, according to him, presumptively conditional, and so if the condition fail, the old obligation remains intact according to the letter of the civil law. But admitting this view to be correct, all that as yet has been shewn is that an action will be granted, and not that the plaintiff will succeed, for he may be met by an exception of *dolus malus* or *pactum conventum*, because the defendant

may allege that the intent of the parties was to abolish the old certain obligation and introduce a new conditional one in its place. This question Gaius leaves unsettled, it can only be decided by the circumstances of each particular case; and so we may sum up his views thus: the presumption is that it is the novation which is conditional, an action will therefore be granted on the old agreement when the condition fails, but the presumption may be rebutted by shewing that it was not the novation, but the second stipulation that was conditional.

The latter part of the paragraph informs us that Servius Sulpicius maintained the doctrine of which Gaius disapproves, viz. that the novation was immediate; and that he regarded from a like point of view a stipulation made with a slave, considering it to work an absolute novation, and so destroy the pre-existent obligation, without, however, being

qui eo nomine agat doli mali aut pacti conventi exceptione possit summoverti, et videatur inter eos id actum, ut ita ea res peteretur, si posterioris stipulationis extiterit condicio. Servius tamen Sulpicius existimavit statim et pendente condicione novationem fieri, et si defecerit condicio, ex neutra causa agi posse, et eo modo rem perire. qui consequenter et illud respondit, si quis id quod sibi Lucius Titius deberet, a servo fuerit stipulatus, novationem fieri et rem perire; quia cum servo agi non potest. sed in utroque casu alio iure utimur: non magis his casibus novatio fit, quam si id quod tu mihi debeas a peregrino, cum quo sponsi communio non est, SPONDES verbo stipulatus sim.

180. Tollitur adhuc obligatio litis contestatione, si modo

who sues in such a case can be met by an exception of fraud or "agreement made," and whether we must consider that the transaction between the parties is to the effect that the thing is to be sued for only in case the condition of the later stipulation come to pass. Servius Sulpicius, however, thought that at once and whilst the condition was in suspense a novation took place, and that if the condition failed no action could be brought on either case, and so the thing was lost. And consistently with himself he also delivered this opinion, that if any one stipulated with a slave for that which Lucius Titius owed him (the stipulator), a novation took place and the thing was lost; because no action can be brought against a slave. But in both these cases we adopt a different rule: for a novation no more takes place in these cases than it would if I stipulated with a foreigner, with whom it is impossible to deal in sponsion<sup>1</sup>, by means of the word *spondes*.

180. An obligation is also dissolved by the *litis contestatio*<sup>2</sup>,

itself valid. Gaius concludes the paragraph by reiterating his dislike of these principles of interpretation. See § 176.

<sup>1</sup> 111. 93. *Sponsus* = *sponsoris promissio*. Dirksen, *sub verb.*

<sup>2</sup> The Roman lawyers did not consider that a contested right was a subject of litigation as soon as the plaintiff had taken the first step towards an action. The moment

when it did become a subject of litigation was the *litis contestatio*. Till the preliminary proceedings before the Praetor were terminated there was room for a peaceable accommodation between the parties, and it was only at the point when the litigants were remitted to a *iudex*, the instant when the proceedings *in iure* terminated and those *in iudicio* began, that the matter must inevitably

legitimo iudicio fuerit actum. nam tunc obligatio quidem principalis dissolvitur, incipit autem teneri reus litis contestatione: sed si condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. et hoc est quod apud veteres scriptum est, ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere. (181.) Unde fit, ut si legitimo iudicio debitum petiero, postea de eo ipso

when proceedings are taken by action based on the statute law. For then the original obligation is dissolved and the defendant begins to be bound by the *litis contestatio*: but if he be condemned, then, the *litis contestatio* being no longer binding (lit. being swept away), he begins to be bound on account of the judgment. And this is the meaning of what is said by ancient writers, that "before the *litis contestatio* the debtor ought to give, after the *litis contestatio* he ought to suffer condemnation (submit to award), after condemnation (award) he ought to do what is adjudged." 181. Hence it follows that if I sue for a debt by action based on statute law<sup>1</sup>,

be left to the decision of the law. The meaning of the term *litis contestatio* is thus given by Festus: "Contestari est cum uterque reus dicit, Testes estote. Contestari litem dicuntur duo aut plures adversarii quod ordinato iudicio utraque pars dicere solet, Testes estote;" where he evidently is referring to the time anterior to the introduction of the formulary process, when *legis actiones* were in use. This ceremony became in later times a mere form, but the name was still retained. See Sanders' edition of the *Institutes*, Introduction, p. 67. Ulpian says, "proinde non originem iudicii spectandam, sed ipsam iudicati velut obligationem," referring to the obligation of a *reus* after award. D. 15. 1. 3. 11.

<sup>1</sup> The differences in procedure between *judicia legitima* and *judicia imperio continentia* are to be found in Gaius, IV. 103—109. Mühlenbruch (in his notes on Heineccius, IV. 6.

27) gives, in substance, the following account of the origin of the appellations and the reasons for the diversity of practice of the two systems: "The reason for the numerous and important differences between the two kinds of *judicia* was that in early times the statute law was confined in its application to a few persons and a narrow district, and cases involving other persons or arising outside this district were settled at the discretion and by the direct authority (*imperium*) of the magistrates: and although in later times this free action of the magistrates was restrained within well-ascertained limits, yet it continued an admitted principle, that in the *judicia* based on the *imperium* of the magistrate there was less adherence to strict rule than in those which sprung from the *leges*. As the state grew, the ancient distinction became a mere matter of outward form, and the one system became so interwoven with the other,

## *Actions on delict.*

iure agere non possim, quia inutiliter intendo DARI MIHI OPOR-  
TERE; quia litis contestatione dari oportere desiit. aliter atque  
si imperio continenti iudicio egerim: tunc enim nihilominus  
obligatio durat, et ideo ipso iure postea agere possum; sed  
debeo per exceptionem rei iudicatae vel in iudicium deductae  
summoverti. quae autem legitima *sint* iudicia, et quae imperio  
contineantur, sequenti commentario referemus.

182. Transeamus nunc ad obligationes quae ex delicto ori-

I cannot afterwards, by the letter of the civil law, bring  
another action for the same, because I plead<sup>1</sup> in vain that  
“it ought to be given to me,” inasmuch as by the *litis con-*  
*testatio* the necessity that it should be given to me ceased<sup>2</sup>.  
It is otherwise if I proceed by action founded on the *imperium*,  
for then the obligation still remains, and therefore, by the  
letter of the law, I can afterwards bring another action: but  
I must be met by the exception *rei iudicatae* or *in iudicium*  
*deductae*<sup>3</sup>. Now what are actions based on statute law, and  
what are actions founded on the *imperium*, we shall state in  
the next commentary<sup>4</sup>.

182. Now let us pass on to actions which arise from delict<sup>5</sup>,

that it seems a marvel the separa-  
tion was kept up so long. Hence it  
at length died away without any  
direct enactment, and it is indispu-  
table that in Justinian's time no ves-  
tiges of it remained.”

As we have mentioned *imperium*  
above, this is perhaps the place to  
remark that this *imperium* implies a  
power of carrying out sentences: a  
magistrate who was merely executory  
was said to have *imperium merum*  
or *poteslas*: one like the Praetor, &c.,  
who could both adjudge and carry  
into execution, possessed *imperium*  
*mixtum*, i. e. a combination of *potes-*  
*las* and *iurisdictio*; for *iurisdictio*,  
sometimes called *notio*, is the attri-  
bute of a magistrate who can only  
investigate, and must apply to other  
functionaries to carry out his deci-  
sions: thus a *iudex* had *iurisdictio*  
only. See Heineccius, *Antiq. Rom.*  
p. 637, 638, Mühlenbruch's edition,  
D. 2. 1. 3.

<sup>1</sup> IV. 41.

<sup>2</sup> IV. 107.

<sup>3</sup> IV. 106, 123. The first excep-  
tion is to the effect that the matter  
has already been adjudicated upon,  
the second that it has been carried  
beyond the *litis contestatio*, and that  
thus there has been a *novatio*. In this  
last-named exception it is obviously  
immaterial whether the court has yet  
arrived at a judgment or not. See  
for a curious case connected with  
this exception, Cic. *de Orat.* 1. 37.

<sup>4</sup> Besides the methods of dissolv-  
ing an obligation already mentioned  
there were (1) *compensatio* and *de-*  
*ductio*, the setting off of what the cre-  
ditor owes to the debtor, in order to  
lessen or extinguish the debt, see IV.  
61—68: (2) *Confusio*, when the ob-  
ligation of the debtor and right of  
the creditor are united in the same  
person: (3) mutual consent, when a  
contract of the consensual kind has  
been made, but its fulfilment not yet  
undertaken by either party.

<sup>5</sup> It must be noticed that all the

untur, veluti si quis furtum fecerit, bona rapuerit, damnum dederit, iniuriam commiserit: quarum omnium rerum uno genere consistit obligatio, cum ex contractu obligationes in IIII genera deducantur, sicut supra exposuimus.

183. Furtorum autem genera Servius Sulpicius et Masurius Sabinus IIII esse dixerunt, manifestum et nec manifestum, conceptum et oblatum: Labeo duo, manifestum, nec manifestum; nam conceptum et oblatum species potius actionis esse furto cohaerentes quam genera furtorum; quod sane verius videtur, sicut inferius apparebit. (184.) Manifestum furtum quidam id esse dixerunt quod *dum fit* apprehenditur. alii *vero* ulterius, quod eo loco apprehenditur ubi fit: velut si in oliveto olivarum, in vineto uvarum furtum factum est, quamdiu in eo oliveto aut

for instance, if a man have committed a theft, carried off goods by violence, inflicted damage, done injury: the obligation arising from all which matters is of one and the same kind<sup>1</sup>, whereas, as we have explained above<sup>2</sup>, obligations from contract are divided into four classes.

183. Of thefts, then, Servius Sulpicius and Masurius Sabinus say there are four kinds, manifest and nec-manifest, concept and oblate: Labeo says there are two, manifest and nec-manifest: for that concept and oblate are rather species of action attaching to theft than kinds of theft: and this view appears to be the more correct one, as will be seen below<sup>3</sup>.

184. Some have defined a manifest theft to be one which is detected whilst it is being committed. Others have gone further, and said it is one which is detected in the place where it is committed: for instance, if a theft of olives be committed in an oliveyard, or of grapes in a vineyard, (it is a manifest theft) so long as the thief is in the vineyard or oliveyard:

actions mentioned in §§ 182—225 are civil actions on delict. *Furtum, rapina*, etc. were also punishable criminally, but with this fact we have at present nothing to do.

<sup>1</sup> They all arise *re*.

<sup>2</sup> III. 89.

<sup>3</sup> III. 186, 187. Gaius, with his usual dislike of definitions, does not give one of theft. Justinian's will be

found in *Inst.* IV. 1. 1. Those of Sabinus given by Aulus Gellius, XI. 18 are: "Qui alienam rem adtrectavit, cum id se invito domino facere judicare deberet, furti tenetur," and "Qui alienum tacens lucri faciendi causa sustulit, furti constringitur, sive scit cujus sit, sive nescit." Gaius implies that this or something like it is his definition in §§ 195, 197 below.

*Furtum manifestum, nec manifestum, conceptum.*

vineto fur sit ; aut si in domo furtum factum sit, quamdiu in ea domo fur sit. alii adhuc ulterius, *cousque* manifestum furtum esse dixerunt, donec perferret eo quo perferre fur destinasset. alii adhuc ulterius, quandoque eam rem fur tenens visus fuerit ; quae sententia non optinuit. *sed* et illorum sententia qui existimaverunt, donec perferret eo quo fur destinasset, deprehensum furtum manifestum esse, *improbata est, quod videbatur aliquam admittere* dubitationem, unius dici *an* etiam plurium dierum spatio id terminandum sit. quod eo pertinet, quia saepe in aliis civitatibus surreptas res in alias civitates vel in alias provincias destinat fur perferre. ex duabus itaque superioribus opinionibus alterutra adprobatur : magis tamen plerique posteriorem probant. (185.) Nec manifestum furtum quod sit, ex iis quae diximus intelligitur : nam quod manifestum non est, id nec manifestum est. (186.) Conceptum furtum dicitur, cum aput aliquem testibus praesentibus furtiva res quaesita et inventa est :

or if a theft be committed in a house, so long as the thief is in the house. Others have gone still further, and said that a theft is manifest until the thief has carried the thing to the place whither he intended to carry it. Others still further, that it is manifest if the thief be seen with the thing in his hands at any time ; but this opinion has not found favour. The opinion, too, of those who have thought a theft to be manifest if detected before the thief has carried the thing to the place he intended, has been rejected, because it seemed to leave the point unsettled, whether theft must in respect of time be limited to one day or to several. This has reference to the fact that a thief often intends to convey things stolen in one state to other states or other provinces. Hence, one or other of the two opinions first cited is the right one ; but most people prefer the second. 185. What a nec-manifest theft is, is gathered from what we have said : for that which is not manifest is "nec-manifest." 186. A theft is termed concept when the stolen thing is sought for and found in any one's possession in the presence of witnesses<sup>1</sup> : for there is a particular kind of action set

<sup>1</sup> The difference between nec-manifest and concept theft is that in the first the thief delivers up the stolen thing or admits his guilt without



nam in eum propria actio constituta est, quamvis fur non sit, quae appellatur concepti. (187.) Oblatum furtum dicitur, cum res furtiva tibi ab aliquo oblata sit, eaque aput te concepta sit; utique si ea mente data tibi fuerit, ut aput te potius quam *apud* eum qui dederit conciperetur. nam tibi, aput quem concepta est, propria adversus eum qui optulit, quamvis fur non sit, constituta est actio, *quae* appellatur oblati. (188.) Est etiam prohibiti furti adversus eum qui furtum quaerere volentem prohibuerit.

189. Poena manifesti furti ex lege XII tabularum capitalis erat. nam liber verberatus addicebatur ei cui furtum fecerat; (utrum autem servus efficeretur ex addictione, an adjudicati

out<sup>1</sup> against him, even though he be not the thief, called the *actio concepti*. 187. A theft is called oblate, when the stolen thing has been put into your hands by any one and is found with you: that is to say, if it have been given to you with the intention that it should be found with you rather than with him who gave it: for there is a particular kind of action set out for you, in whose hands the thing is found, against him who put the thing into your hands, even though he be not the thief, called the *actio oblati*<sup>2</sup>. 188. There is also an *actio prohibiti furti* against one who offers resistance to a person wishing to search.

189. The penalty of a manifest theft was by a law of the Twelve Tables capital<sup>3</sup>. For a free man, after being scourged, was assigned over to the person on whom he had committed the theft: (but whether he became a slave by the assignment, or was put into the position of an *adjudicatus*<sup>4</sup>, was disputed

throwing on the plaintiff the trouble of a search, whilst in the other he denies his culpability but submits quietly to the search: of course if he offer resistance the case becomes one of *furtum prohibitum*.

<sup>1</sup> *Constitutum* sc. in the Praetor's edict.

<sup>2</sup> Paulus, *S. R.* II. 31. 3.

<sup>3</sup> Tab. VIII. l. 14. For the meaning of "capital" see note on III. 213.

<sup>4</sup> *Adjudicatus*, more usually *addictus*, (but Gaius probably uses the former appellation in this passage to

avoid confusion, having already written *addicebatur* in a different signification,) means an insolvent debtor delivered over to his creditor. The *adjudicati* were not reduced to slavery, (the common opinion to that effect being erroneous,) but they had to perform for their creditor servile offices. That they differed from slaves is proved by many facts: e.g. when by payment of the debt they were liberated from the creditor, they were treated thenceforth as *ingenui* and not as *libertini*: the creditor to



loco constitueretur, veteres quaerebant); *servum* aequè verberatum *e saxo deiciebant*. postea improbata est asperitas poenae, et tam ex servi persona quam ex liberi quadrupli actio Praetoris edicto constituta est. (190.) Nec manifesti furti poena per legem XII tabularum dupli inrogatur; quam etiam Praetor conservat. (191.) Concepti et oblati poena ex lege XII tabularum tripli est; quae similiter a Praetore servatur. (192.) Prohibiti actio quadrupli ex edicto Praetoris introducta est. lex autem eo nomine nullam poenam constituit: hoc solum praecepit, ut qui quaerere velit, nudus quaerat, linteo cinctus, lancem habens; qui si quid invenerit, iubet id lex furtum manifestum esse. (193.) Quid sit autem linteum, quaesitum est. sed verius est consuti genus esse, quo necessariae partes tegerentur. quare

amongst the ancients): a slave, after he had in like manner been scourged, they hurled from a rock. In later times objection was taken to the severity of the punishment, and in the Praetor's edict an action for four-fold was set forth, whether the offender were slave or free<sup>1</sup>. 190. The penalty of a nec-manifest theft was laid at two-fold by the law of the Twelve Tables: and this the Praetor retains<sup>2</sup>. 191. The penalty of concept and oblate theft was three-fold by the law of the Twelve Tables: and this too is retained by the Praetor. 192. The action with four-fold penalty for prohibited theft was introduced by the Praetor's edict. For the law had enacted no penalty in this case; but had only commanded<sup>3</sup> that a man wishing to search should search naked, girt with a *linteum* and holding a dish; and if he found any thing the law ordered the theft to be regarded as manifest. 193. Now what a *linteum* may be is a moot point<sup>4</sup>: but it is most probable that it was a kind of cincture with which the private parts were covered.

whom payment of the debt was tendered was compelled to accept it: the debtors retained their praenomen, cognomen, tribe, &c. See Heinecc. *Antiquit. Rom.* III. 29. § 2.

<sup>1</sup> If the master declined to pay the penalty for his slave, he could give him up as a *naxa*. IV. 75.

<sup>2</sup> See Maine's ingenious explanation of the wide difference in the ancient penalties of *furtum manifestum*

and *nec manifestum*. *Ancient Law*, p. 379.

<sup>3</sup> Tab. VIII. l. 15.

<sup>4</sup> The *linteum* is called *licium* sometimes, e. g. in Festus: "Lance et licio dicebatur apud antiquos, quia qui furtum ibat quaerere in domo aliena, licio cinctus intrabat, lancemque ante oculos tenebat propter matrumfamilias aut virginum praesentiam."

lex tota ridicula est. nam qui vestitum quaerere prohibet, is et nudum quaerere prohibiturus est: eo magis quod ita quaesita res inventa maiori poenae subiciatur. deinde quod lancem sive ideo haberi iubeat, ut manibus occupantis nihil subiciatur, sive ideo, ut quod invenerit, ibi imponat: neutrum eorum procedit, si id quod *quaeratur* eius magnitudinis aut naturae sit, ut neque subici neque ibi imponi possit. certe non dubitatur, cuiuscumque materiae sit ea lanx, satis legi fieri. (194.) Propter hoc tamen, quod lex ex ea causa manifestum furtum esse iubet, sunt qui scribunt furtum manifestum aut lege aut natura *intelligi*: lege id ipsum de quo loquimur; natura illud de quo superius exposuimus. sed verius est natura tantum manifestum furtum intelligi. neque enim lex facere potest, ut qui manifestus fur non sit, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter aut homicida non sit, adulter vel

Hence the whole law is absurd. For any one who resists search by a man clothed, would also resist search by him naked: especially as a thing sought for and found in this manner is subjected to a heavier penalty. Then as to its ordering a dish to be held, whether it be that nothing might be introduced stealthily by the hands of the holder, or that he might lay on it what he found<sup>1</sup>; neither of these explanations is satisfactory, if the thing sought for be of such a size or character that it can neither be introduced by stealth nor placed on the dish. On this point, at any rate, there is no dispute, that the law is satisfied whatever be the material of which the dish is made. 194. Now, since the law orders that a theft shall be manifest under the above circumstances, there are writers who maintain that a theft may be regarded as manifest either by law or by nature: by law, that of which we are now speaking; by nature, that of which we treated above. But it is more correct for a theft to be considered as manifest only by nature. For a law can no more cause a man who is not a manifest thief to become manifest, than it can cause a man who is not a thief at all to become a thief, or one who is not an adulterer or homicide to become an

<sup>1</sup> Festus in the passage just quoted assigns a third reason. Other authors adopt that first given in the text, and say that the dish was carried on the head and supported by both hands. See Heinecc. *Antiq.* IV. i. §

homicida sit : at illud sane lex facere potest, ut perinde aliquis poena teneatur atque si furtum vel adulterium vel homicidium admisisset, quamvis nihil eorum admiserit.

195. Furtum autem fit non solum cum quis intercipiendi causa rem alienam amovet, sed generaliter cum quis rem alienam invito domino contrectat. (196.) Itaque si quis re quae aput eum deposita sit utatur, furtum committit. et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur. veluti si quis argentum utendum acceperit, *quod* quasi amicos ad coenam invitaturus rogaverit, et id peregre secum tulerit, aut si quis *equum* gestandi gratia commodatum longius secum aliquo duxerit ; quod veteres scripserunt de eo qui in aciem perduxisset. (197.) Placuit tamen eos qui *rebus* commodatis aliter uterentur quam utendas accepissent, ita furtum committere, si intelligant id se invito domino facere, eumque, si intellexisset, non permissurum ; et si permissurum crederent, extra

adulterer or homicide : but this no doubt the law can do, cause a man to be liable to punishment as though he had committed a theft, adultery or homicide, although he have committed none of them.

195. A theft takes place not only when a man removes another's property with the intent of appropriating it, but generally when any one deals with what belongs to another against the will of the owner. 196. Therefore, if any one make use of a thing which has been deposited<sup>1</sup> with him, he commits a theft. And if any one have received a thing to be used, and convert it to another use, he is liable for theft. For example, if a man have received silver plate to be used, asking for it on the pretext that he is about to invite friends to supper, and carry it abroad with him ; or if any one take with him to a distance a horse lent him for the purpose of a ride : and the instance the ancients gave of this was a man's taking a horse to battle. 197. It has been decided, however, that those who employ borrowed things for other uses than those for which they received them, only commit a theft in case they know they are doing this against the will of the owner, and that if he knew of the proceeding he would not allow it : and if they believe he would allow it, they are

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<sup>1</sup> See note (I) in Appendix.

furti crimen videri: optima sane distinctione, quia furtum sine dolo malo non committitur. (198.) Sed et si credat aliquis invito domino se rem contrectare, domino autem volente id fiat, dicitur furtum non fieri. unde illud quaesitum est, cum Titius servum meum sollicitarit, ut quasdam res mihi subriperet et ad eum perferret, et servus id ad me pertulerit, ego, dum volo Titium in ipso delicto deprehendere, permiserim servo quasdam res ad eum perferre, utrum furti, an servi corrupti iudicio teneatur Titius mihi, an neutro: responsum, neutro eum teneri, furti ideo quod non invito me res contrectarit, servi corrupti ideo quod deterior servus factus non est. (199.) Interdum autem etiam liberorum hominum furtum fit, velut si quis liberorum nostrorum qui in potestate nostra sunt, sive etiam uxor quae in manu nostra sit, sive etiam iudicatus vel auctoratus meus subreptus fuerit. (200.) Aliquando

not considered to be chargeable with theft: the distinction being a very proper one, since theft is not committed without wrongful intent. 198. And even if a man believe that he is dealing with a thing against the will of its owner, whilst the proceeding is agreeable to the will of the owner, it is said there is no theft committed. Hence this question has been raised; Titius having made proposals to my slave to steal certain things from me and bring them to him, and the slave having informed me of this, I, wishing to convict Titius in the act, allowed my slave to take certain things to him: is then Titius liable to me in an action of theft, or corruption of a slave, or neither: the answer was, that he was liable in neither<sup>1</sup>, not in an action of theft, because he had not dealt with the things against my will, nor in an action for corruption of a slave, because the integrity of the slave had not been corrupted. 199. Sometimes there can be a theft even of free persons<sup>2</sup>, for instance if one of my descendants who are in my *potestas*, or my wife who is in my *manus*, or my judgment-debtor<sup>3</sup>, or one who has engaged himself to me as a gladiator<sup>4</sup>, be abducted. 200. Sometimes, too, a man

<sup>1</sup> See Justinian's reasons for giving an opposite decision in *Inst.* IV. 1. 8.

<sup>2</sup> Technically styled *plagium*.

<sup>3</sup> IV. 21.

<sup>4</sup> *Auctoratus* is defined by Paulus: "qui auctoramento locatus est ad gladium:" and Dirksen explains *auctoramentum* to be an equivalent of *jusiurandum*. Gladiators were not

etiam suae rei quisque furtum committit, veluti si debitor rem quam creditori pignori dedit subtraxerit, vel si bonae fidei possessori rem meam possidenti subriperim. unde placuit eum qui servum suum quem alius bona fide possidebat ad se reversum celaverit furtum committere. (201.) Rursus ex diverso interdum *rem* alienam occupare et usucapere concessum est, nec creditur furtum fieri, velut res hereditarias quarum *non* prius nactus possessionem necessarius heres esset; *nam* necessario herede extante placuit, ut pro herede usucapi possit. debitor quoque qui fiduciam quam creditori mancipaverit aut in iure cesserit *detinet*, ut superiore commentario rettulimus, sine furto possidere et usucapere potest.

202. Interdum furti tenetur *qui* ipse furtum non fecerit: qualis est cuius ope consilio furtum factum est. in quo numero

commits a theft of his own property, for example, if a debtor take away by stealth a thing he has given for pledge to his creditor<sup>1</sup>, or if I take by stealth my own property from a possessor in good faith. Therefore, it has been ruled that a man commits a theft who, on the return of his own slave whom another possessed in good faith, conceals him. 201. Conversely, again, we are sometimes allowed to take possession of another's property and acquire it by usucapion, and no theft is considered to be committed, the items of an inheritance, for example, of which a necessary heir has not previously obtained possession<sup>2</sup>: for when the heir is of the "necessary" class, it has been ruled that there may be usucapion *pro herede*. A debtor also who retains the possession of a pledge which he has made over to his creditor by mancipation or *cessio in iure*, can, as we have stated in the preceding commentary, possess it and acquire it by usucapion without committing theft<sup>3</sup>.

202. Sometimes a man is liable for a theft who has not himself committed it: of such kind is he by whose aid and counsel a theft has been committed; and in this category

all captives or criminals; Roman citizens sometimes sold themselves to fight in the arena.

<sup>1</sup> III. 204.

<sup>2</sup> See II. 9. §2, §8. In the first of these passages it is not

stated that the *possessio pro herede* of a stranger is tolerated only when the heir is "necessary" (II. 153), but that seems to be implied in the passage II. §8 and that now before us.

<sup>3</sup> II. 59, 60.

est qui nummos tibi excussit, ut eos alius surriperet, vel obstitit tibi, ut alius surriperet, aut oves aut boves tuas fugavit, ut alius eas exciperet; et hoc veteres scripserunt de eo qui panno rubro fugavit armentum. Sed si quid per lasciviam, et non data opera, ut furtum committeretur, factum sit, videbimus an utilis *Aquiliae actio* dari debeat, cum per legem Aquiliam quae de damno lata est etiam culpa puniatur.

203. Furti autem *actio* ei competit cuius interest rem salvam esse, licet dominus non sit: itaque nec domino aliter competit, quam si eius intersit rem non perire. (204.) Unde constat creditorem de pignore subrepto furti agere posse; adeo quidem, ut quamvis ipse dominus, id est ipse debitor, eam rem subriperit, nihilominus creditori competit *actio furti*. (205.) Item si fullo polienda curandave, aut sarcinator sarcienda vestimenta

must be included one who has struck money out of your hand that another may carry it off, or has put himself in your way that another may carry it off, or has scattered your oxen or sheep that another may make away with them; and the instance the ancients gave of this was a man's scattering a herd by means of a red rag. But if anything be done in wantonness, and not with set purpose for a theft to be committed, we shall have to consider whether a constructive Aquilian action should be granted<sup>1</sup>, since by the *Lex Aquilia* which was passed with reference to damage, culpable negligence<sup>2</sup> is also punished.

203. The action of theft lies for him whom it interests that the thing should be safe, even though he be not the owner: and thus again it does not lie for the owner unless he have an interest that the thing should not perish. 204. Hence it is an admitted principle that a creditor can bring an action of theft for a pledge which has been carried off: so that even if the owner himself, that is the debtor, have carried it off, still the action of theft lies for the creditor. 205. Likewise, if a fuller have taken garments to smooth or clean, or a tailor to

<sup>1</sup> The meaning of the passage is this: "in the case supposed there is no *actio furti*; the point therefore which we shall have to consider in any particular instance is whether a constructive Aquilian action will lie." *Utilis* has been explained above in

the note on II. 78. The action would be *utilis* and not *directa*, because the direct action could only be brought when the damage was done

*corpore*, III. 2

<sup>2</sup> III. 211.

mercede certa acceperit, eaque furto amiserit, ipse furti habet actionem, non dominus; quia domini nihil *interest* ea non perisse, cum iudicio locati a fullone aut sarcinatore suum *persequi* possit, si modo is fullo aut sarcinator *ad* rem praestandam sufficiat; nam si solvendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio competit, quia hoc casu ipsius interest rem salvam esse. (206.) Quae de fullone aut sarcinatore diximus, eadem transferemus et ad eum cui rem commodavimus: nam ut illi mercedem capiendo custodiam praestant, ita hic quoque utendi commodum percipiendo similiter necesse habet custodiam praestare. (207.) Sed is aput quem res deposita est custodiam non praestat, tantumque in eo obnoxius est, si quid ipse dolo fecerit: qua

patch, for a settled hire, and have lost them by theft, he has the action of theft and not the owner: because the owner has no interest in the thing not perishing, since he can by an action of letting recover his own from the fuller or tailor, provided the fuller or tailor have money enough to make payment: for if he be insolvent, then, since the owner cannot recover his own from him, the action lies for the owner himself, for in this case he has an interest in the thing being safe. 206. These remarks about the fuller or tailor we shall also apply to a person who has lent a thing to any one: for in like manner as the former by receiving hire becomes responsible for safe keeping, so does the borrower by enjoying the advantage of the use also become responsible for the same. 207. But a person with whom a thing is deposited is not responsible for its keeping, and is only answerable for what he himself does wilfully<sup>1</sup>: hence, if the thing which he ought

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<sup>1</sup> The depositary is only liable for *dolus*, the text says. The general rule in contracts was that the person benefited was liable for *culpa levis*, i.e. for even trivial negligences, whilst the person on whom the burden was cast was only liable for *culpa lata*, gross negligence. *Dolus* imports a wilful injury; *culpa* an unintentional damage, but one caused by negligence. The depositary would be liable for *dolus* and *culpa lata*. Gaius,

therefore, is not speaking with strict accuracy when he says the depositary is liable only "*si quid ipse dolo fecerit*;" but perhaps he had in his thoughts the well-known maxim, *culpa lata dolo aequiparatur*, in which case his dictum is correct. For some useful remarks on the subject of *culpa* see Sandars' edition of the *Institutes*, pp. 466, 467. See also Jones, *On Bailments*, pp. 8-24.



de *causa*, si res ei subrepta fuerit quae restituenda est, eius nomine depositi non tenetur, nec ob id eius interest rem salvam esse: furti itaque agere non potest; sed ea actio domino competit.

208. In summa sciendum est quaesitum esse, an impubes rem alienam amovendo furtum faciat. plerisque placet, quia furtum ex adfectu consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit, et ob id intelligat se delinquere.

209. Qui res alienas rapit tenetur etiam furti: quis enim magis alienam rem invito domino contrectat quam qui rapit? itaque recte dictum est eum improbum furem esse. sed propriam actionem eius delicti nomine Praetor introduxit, quae appellatur vi bonorum raptorum; et est intra annum quadrupli actio, post

to restore be stolen from him, he is not liable to an action of deposit in respect of it, and thus he has no interest that the thing should be safe; therefore he cannot bring an action of theft, but that action lies for the owner. 208. Finally, we must observe that it is a disputed point whether a child under puberty commits a theft by removing another person's property. It is generally held that as theft depends on the intent, he is only liable to the charge, if he be very near puberty<sup>1</sup>, and therefore aware that he is doing wrong.

209. He who takes by violence the goods of another is liable for theft (as well as *rapina*): for who deals with another's property more completely against the owner's will than one who takes it by violence? And therefore it is rightly said that he is an *improbus fur*. But the Praetor has introduced a special action in respect of this delict, which is called the *actio vi bonorum raptorum*, and is an action for fourfold<sup>2</sup> if brought within the year, and for the single value if brought

<sup>1</sup> Probably Gaius is not writing technically when he uses the expression "pubertati proximus." The sources, however, sometimes speak of a child under seven as *infanti proximus*, and one between seven and fourteen as *pubertati proximus*. See Savigny, *On Possession*, p. 180, n. (b).

<sup>2</sup> The fourfold penalty in this *actio* includes restitution of the thing, so that more correctly the penalty is threefold. In an *actio furti manifesti*, on the contrary, the penalty is really fourfold, the thing itself being recovered separately by a *vindicta*. See IV. 8; Just. *Inst.* IV. 6. 19.



annum simpli. quae actio utilis est, et si quis unam rem, licet minimam, rapuerit.

210. Damni iniuriae actio constituitur per legem Aquiliam. cuius primo capite cautum est, *ut* si quis hominem alienum, eamve quadrupedem quae pecudum numero sit, iniuria occiderit, quanti ea res in eo anno plurimi fuerit, tantum domino dare damnetur. (211.) Is iniuria autem occidere intelligitur cuius dolo aut culpa id acciderit, nec ulla alia lege damnum quod sine iniuria datur reprehenditur: itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit. (212.) Nec solum corpus in actione huius legis aestimatur; sed sane si servo occiso plus dominus capiat damni quam pretium servi sit, id quoque aestimatur: velut si servus meus ab aliquo heres institutus, ante quam iussu meo hereditatem cerneret, occisus

after the year: and is available<sup>1</sup> when a man has taken by violence a single thing, however small it may be.

210. The action called *damni iniuriae* (of damage done wrongfully) was introduced by the *Lex Aquilia*<sup>2</sup>, in the first clause of which it is laid down that if any one have wrongfully slain another person's slave, or an animal included in the category of cattle, he shall be condemned to pay to the owner the highest value the thing has borne within that year. 211. A man is considered to slay wrongfully when the death takes place through his malice or negligence: and damage committed without wrongfulness is not punished by this or any other law: so that a man is unpunished when he commits a damage through some mischance without negligence or malice. 212. In an action on this law the account taken is not restricted to the mere value of the thing destroyed, but undoubtedly if by the slaying of the slave the owner receive damage over and above the value of the slave, that too is included; for instance, if a slave of mine, instituted heir by any

<sup>1</sup> We have several times already come across the word *utilis* derived from *uti* (as), but *utilis* here is the more common adjective derived from *utor*, to use.

<sup>2</sup> The words of this clause of the law are given in D. 9. 1. 1. pr. In D. 9. 2. 1 we are told that the *Lex*

*Aquilia* was a plebiscite, and Theophilus assigns it to the time of the secession of the *plebs*, probably meaning that to the Janiculum, 285 B.C. The second clause was on a different subject, as Gaius tells us in § the third is quoted in D. 9. 2. 17

fuerit ; non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. item si ex gemellis vel ex comoedis vel ex symphoniacis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius quoque computatur quod ceteri qui supersunt depretiati sunt. idem iuris est etiam si ex pari mularum unam, vel etiam ex quadrigis equorum unum occiderit. (213.) Cuius autem servus occisus est, is liberum arbitrium habet vel capitali crimine reum facere eum qui occiderit, vel hac lege damnum persequi. (214.) Quod autem adiectum est in hac lege: QUANTI IN EO ANNO PLURIMI EA RES FUERIT, illud efficit, si clodum puta aut luscum servum occiderit, qui in eo anno integer fuerit, *ut non quanti mortis tempore, sed quanti in eo anno plurimi fuerit*, aestimatio fiat. quo fit, ut quis plus interdum consequatur quam ei damnum datum est.

one, be slain before he has made cretion<sup>1</sup> for the inheritance at my command. For not only the price of the man himself is computed, but the amount of the lost inheritance also. So too if one of twins or one of a band of actors or musicians be slain, not only is the value of the slaughtered slave taken into account, but besides this the amount whereby the survivors are depreciated. The rule is the same if one of a pair of mules or of a team of horses be killed. 213. A man whose slave has been slain is free to choose whether he will make the slayer defendant on a capital<sup>2</sup> charge or sue for damages under this law. 214. The insertion in the law of the words "the highest value the thing had within the year" has this effect, that if a man have killed a lame or one-eyed slave, who was whole within the year, an estimate is made not of his value at the time of death, but of his best value within the year. The result of which is that sometimes a master gets more than the amount of the damage he has suffered.

<sup>1</sup> II. 164.

<sup>2</sup> *Capitalis* does not necessarily mean "capital" in our sense of the word, but signifies "affecting either the life, liberty, or citizenship and reputation." See Dirksen *sub verbo*. The law under which the criminal suit could be brought in the present

case was the *Lex Cornelia de sicariis* (71 B.C.), the penalty under which was interdiction from fire and water, consequently loss of citizenship, Heineccius, IV. 18, 58. According to the Code (III. 35. 3), a master whose slave had been killed could bring both a criminal and a civil action.

215. Capite secundo *in* adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur. (216.) quæ et ipsa parte legis damni nomine actionem introduci manifestum est. sed id caveri non fuit necessarium, cum actio mandati ad eam rem sufficeret; nisi quod ea lege adversus infitiantem in duplum agitur.

217. Capite tertio de omni cetero damno cavetur. itaque si quis servum vel eam quadrupedem quæ pecudum numero est vulneraverit, sive eam quadrupedem quæ pecudum numero non est, velut canem, aut feram bestiam velut ursum leonem vulneraverit vel occiderit, ex hoc capite actio constituitur. in ceteris quoque animalibus, item in omnibus rebus quæ anima carent, damnum iniuria datum hac parte vindicatur. si quid enim ustum aut ruptum aut fractum fuerit, actio hoc capite constituitur; quamquam potuerit sola rupti appellatio in omnes istas causas sufficere: ruptum enim intelligitur quod quoquo modo corruptum est. unde non solum usta aut rupta aut fracta, sed etiam scissa

215. In the second clause (of the Aquilian law) an action is granted against an adstipulator<sup>1</sup> who has given an acceptance<sup>2</sup> in fraudance of his stipulator, for the value of the thing concerned. 216. And that this provision was introduced into this part of the law on account of the damage accruing, is plain; although there was no need for such a provision, since the action of mandate<sup>3</sup> would suffice, save only that under this (the Aquilian law) the action is for double<sup>4</sup> against one who denies his liability.

217. In the third clause provision is made regarding all other damage. Therefore if any one have wounded a slave or a quadruped included in the category of cattle, or either killed or wounded a quadruped not included in that category, as a dog or a wild-beast, such as a bear or lion, the action is based on this clause. And with respect to all other animals, as well as with respect to things devoid of life, damage done wrongfully is redressed under this clause. For if anything be burnt, or broken, or shattered, the action is based on this clause: although the word "broken" (*ruptum*) would by itself have met all these cases: for by *ruptum* is understood that which is spoiled in any way. Hence not only things burnt, or

<sup>1</sup> III. 110.

<sup>2</sup> III. 169.

<sup>3</sup> III. 111.

<sup>4</sup> IV. 9.

et collisa et effusa et *diruta* aut perempta atque deteriora facta hoc verbo continentur. (218.) Hoc tamen capite non quanti in eo anno, sed quanti in diebus xxx proxumis ea res fuerit, damnatur is qui damnum dederit; ac ne PLURIMI quidem verbum adicitur: et ideo quidam *diversae scholae auctores* putaverunt liberum esse ius *datum, ut duntaxat de XXX diebus proxumis vel eum Praetor formulae* adiceret quo plurimi res fuit, vel alium quo minoris fuit. sed Sabino placuit perinde habendum ac si etiam hac parte PLURIMI verbum adiectum esset: nam legis latorem contentum fuisse, *quod prima parte eo verbo usus esset.* (219.) Et placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit. itaque alio modo damno dato utiles actiones dantur: velut si quis alienum hominem aut pecudem incluserit et fame necaverit, aut iumentum tam vehementer egerit, ut rumperetur; aut si quis alieno servo persuaserit, ut in

broken, or shattered, but also things torn, and bruised, and spilled, and torn down or destroyed, and deteriorated are comprised in this word. 218. Under this clause, however, the committer of the damage is condemned not for the value of the thing within the year, but within the 30 days next preceding: and the word *plurimi* (the highest value) is not added, and therefore certain authorities of the opposite school have maintained that the Praetor has full power given him to insert in the *formula*<sup>1</sup> a day, provided only it be one of the thirty next preceding, when the thing had its highest value or another day on which it had a lower one. But Sabinus held that the clause must be interpreted just as though the word *plurimi* had been inserted in this place also, for he said the author of the law was satisfied with having employed the word in the first part of the law. 219. Also it has been ruled that an action lies under this law only when a man has done damage by means of his own body. Therefore for damage done in any other mode *utiles actiones*<sup>2</sup> are granted: for instance, if a man have shut up another person's slave or beast and starved it to death, or driven a beast of burden so violently as to cause its destruction: or if a man have persuaded another person's slave to go up a tree or down a well, and

<sup>1</sup> IV. 30.<sup>2</sup> See note on II.

arborem ascenderet vel in puteum descenderet, et *is* ascendendo aut descendendo ceciderit, *et* aut mortuus fuerit aut aliqua parte corporis laesus sit. item si quis alienum servum de ponte aut ripa in flumen proiecerit et *is* suffocatus fuerit, *tum* hic corpore suo damnum dedisse eo quod proiecerit, non difficiliter intelligi potest.

220. Iniuria autem committitur non solum cum quis pugno pulsatus aut fuste percussus vel etiam verberatus erit, sed et si cui convicium factum fuerit, sive quis *bona* alicuius quasi debitoris sciens eum nihil debere sibi proscripserit, sive quis ad infamiam alicuius libellum aut carmen scripserit, sive quis matremfamilias aut praetextatum adsectatus fuerit, et denique aliis pluribus modis. (221.) Pati autem iniuriam videmur non solum per nosmet ipsos, sed etiam per liberos nostros quos in

in going up or down he have fallen, and either been killed or injured in some part of his body. So also if a man have thrown another person's slave from a bridge or bank into a river and he have been drowned, it is plain enough that he has caused the damage with his body inasmuch as he cast him in.

220. Injury<sup>1</sup> is inflicted not only when a man is struck with the fist, or beaten with a stick or lashed, but also when abusive language<sup>2</sup> is publicly addressed to any one, or when any person knowing that another owes him nothing advertises<sup>3</sup> that other's goods for sale as though he were a debtor, or when any one writes a libel or a song to bring disgrace on another, or when any one follows about a married woman or a young<sup>4</sup> boy, and in fact in many other ways. 221. We can suffer injury not only in our own persons but also in the persons of our children whom we have in our *potestas*; and so

<sup>1</sup> For the different significations of the word *injuria* see Justinian, IV. 4. pr., a passage which is in great measure borrowed from Paulus.

<sup>2</sup> An explanation of the word *convicium* is given by Ulpian in D. 47. 10. 15. 4: "Convicium autem dicitur vel a concitatione vel a conventu, hoc est, a collatione vocum, quum enim in unum complures voces conferuntur, convicium appellatur, quasi convocium." Hence *convicium* means either abusive language

addressed to a man publicly, or the act of inciting a crowd to beset a man's house or to mob the man himself.

<sup>3</sup> Sc. obtains from the Praetor an order for possession and leave to advertise, by making false representations to that magistrate.

<sup>4</sup> *Praetextatus* signifies under the age of puberty, as at the age of fourteen the *toga virilis* was assumed and the *toga praetextata* discarded.

potestate habemus ; item per uxores nostras *quavis* in manu nostra *non* sint. itaque si *veluti* filiae meae quae Titio nupta est iniuriam feceris, non solum filiae nomine tecum agi iniuriarum potest, verum etiam meo quoque et Titii nomine. (222.) Servo autem ipsi *quidem* nulla iniuria intelligitur fieri, sed domino per eum fieri videtur : non tamen iisdem modis quibus etiam per liberos nostros vel uxores, iniuriam pati videmur, sed ita, cum quid atrocius commissum fuerit, quod aperte in *contumeliam* domini fieri videtur, veluti si quis alienum servum verberaverit ; et in hunc casum formula proponitur. at si quis servo convicium fecerit vel pugno eum percusserit, non proponitur ulla formula, nec temere petenti datur.

223. Poena autem iniuriarum ex lege XII tabularum propter membrum quidem ruptum talio erat ; propter os vero fractum aut collisum trecentorum assium poena erat *statuta*, si libero os fractum erat ; at si servo, *cl.* propter ceteras vero iniurias xxv

too in the persons of our wives, even though they be not in our *manus*. For example then, if you do an injury to my daughter who is married to Titius, not only can an action for injuries be brought against you in the name of my daughter, but also one in my name, and one in that of Titius. 222. To a slave himself it is considered that no injury can be done, but it is regarded as done to his master through him : we are not, however, looked upon as suffering injury under the same circumstances (through slaves) as through our children or wives, but only when some atrocious act is done, which is plainly seen to be intended for the insult of the master, for instance when a man has flogged the slave of another, and a *formula* is set forth<sup>1</sup> to meet such a case. But if a man have used abusive language to a slave in public or struck him with his fist, no *formula* is set forth, nor is one granted to a demandant except for good reason<sup>2</sup>.

223. By a law of the Twelve Tables<sup>3</sup> the penalty for injuries was like for like in the case of a limb destroyed ; but for a bone broken or crushed a penalty of 300 *asses* was appointed, if the sufferer were a free man, and 150 if he were a

<sup>1</sup> Sc. in the edict.

<sup>2</sup> That is to say he has neither an action framed on any known formula, nor even one "*praescriptis verbis*,"

unless there be some special circumstances of aggravation.

<sup>3</sup> Tab. VIII. ll. 2, 3, and 4.

### *Atrox Iniuria.*

assium poena erat constituta. et videbantur illis temporibus in magna paupertate satis idoneae istae pecuniae poenae esse. (224.) Sed nunc alio iure utimur. permittitur enim nobis a Praetore *ipsis* iniuriam aestimare; et iudex vel tanti condemnat quanti nos aestimaverimus, vel minoris, prout illi visum fuerit. sed cum atrocem iniuriam Praetor aestimare soleat, si simul constituerit quantae pecuniae nomine fieri debeat vadimonium, hac ipsa quantitate taxamus formulam, et iudex quamvis possit vel minoris damnare, plerumque tamen propter ipsius Praetoris auctoritatem non audet minuere condemnationem. (225.) Atrox autem iniuria aestimatur vel ex facto, velut si quis ab aliquo vulneratus aut verberatus fustibusve caesus fuerit; vel ex loco, velut si cui in theatro aut in foro iniuria facta sit; vel ex persona, velut si magistratus iniuriam passus fuerit, vel senatoribus ab humili persona facta sit iniuria.

slave. For all other injuries the penalty was set at 25 *asses*. And these pecuniary penalties appeared sufficient in those times of great poverty. 224. But now-a-days we follow a different rule, for the Praetor allows us to assess our injury for ourselves: and the *iudex* awards damages either to the amount at which we have assessed or to a smaller amount, according to his own discretion. But in cases where the Praetor accounts an injury "atrocious," if he at the same time have settled the amount of *vadimonium*<sup>1</sup> which is to be given, we limit<sup>2</sup> the *formula* to this quantity, and although the *iudex* can award a smaller amount of damages, yet generally, on account of the respect which is due to the Praetor, he dare not make his award smaller than the *condemnatio*<sup>3</sup>. 225. Now an injury is considered "atrocious" either from the character of the act, for instance, if a man be wounded, or flogged, or beaten with sticks by another; or from the place, for instance, if the injury be done in the theatre or the forum; or from the person, for instance, if a magistrate have suffered the injury, or it have been inflicted by a man of low rank on a senator.



## BOOK IV.

*Superest, ut de actionibus loquamur.*

1. *Si quaeritur*, quot genera actionum sint, verius videtur duo esse: in rem et in personam. nam qui IIII esse dixerunt ex sponsonum generibus, non animadverterunt quasdam species actionum inter genera se rettulisse. (2.) In personam actio est

1. It now remains for us to speak of actions. If it be asked how many classes of actions there are, the more correct answer is that there are two, those *in rem* and those *in personam*<sup>1</sup>: for they who have asserted that there are four, framed on the different classes of *sponsiones*<sup>2</sup>, have not noticed the fact that some individual kinds of actions unite together and

<sup>1</sup> It is thought better to keep the terms *in rem* and *in personam*, than to employ the apparent English equivalents "real" and "personal," for though "personal" may, and frequently does, closely correspond with the Roman term *in personam*, real never does with *in rem*. See Savigny, *Syst. des heut. Rom. recht.*, translated into French by Guénoux, *Traité de dr. Rom.* v. § 207, p. 44. Austin, Vol. III. p. 215 (Vol. II. p. 1011, third edition).

<sup>2</sup> *Sponsiones* belong to the time of the formulary method of suit, therefore the explanation now given of them will hardly be intelligible to a reader who is not acquainted, at least in outline, with the nature of the formulae, which is discussed somewhat later in this book.

When a controversy was raised on any point, whether of fact or of law, one of the litigants might

challenge the other in a wager (*sponsio*) "ni ita esset," i.e. that if it were as the challenger asserted, the challenged should pay him some amount specified: and generally, but not always, there was a *restipulatio* or counter-wager, that if it were not as the challenger stated, the challenger should pay the same amount to the challenged.

The origin of these *sponsiones* is referred by Heffter to a period subsequent to the passing of the Lex Silia (IV. 13), which brought into use the condiction *de pecunia certa credita*, for it is evident that by the introduction of a *sponsio* an obligation of any kind whatever might be turned into an equivalent pecuniary engagement, and so be sued upon under that *Lex*.

The notion of the wager was obviously derived from the old *actio*



qua agimus quotiens cum aliquo qui nobis vel ex contractu vel ex delicto obligatus est *contendimus*, id est cum intendimus dare, facere, praestare oportere. (3.) In *rem* actio est, cum aut corporalem rem intendimus nostram esse, aut ius aliquod nobis competere, velut utendi, aut utendi fruendi, eundi, agendi, aquamve ducendi, vel altius tollendi vel prospiciendi. item actio ex diverso adversario est *negativa*.

4. Sic itaque discretis actionibus, certum est *non posse* nos

form themselves into classes<sup>1</sup>. 2. The action *in personam* is the one we resort to whenever we sue some person, who has become bound to us either upon a contract or upon a delict, that is, when we assert in the *intentio*<sup>2</sup> that he ought to give or do something, or perform some duty. 3. The action is one *in rem*, when in the *intentio* we assert either that a corporeal thing is ours, or that some right belongs to us, as, for example, that of *usus*<sup>3</sup> or *usufruct*, of way, of passage for cattle, of conducting water, of raising one's buildings, or of view and prospect. So on the other hand the opposite party's action is (also *in rem*, but) negative<sup>4</sup>.

4. Actions, therefore, being thus classified, it is certain that

but, as Gaius observes, there was a difference between the two, for the sum of the *sponsio* or *restipulatio* went to the victorious litigant, whilst that of the *sacramentum* was forfeited to the state.

Heffter thinks the "four kinds of actions framed on the various of sponsions" were:

- (1) Actions *in rem* with a sponsion *pro praede litis et vindictarum*, and without a restipulation (see IV. 16).
- (2) Actions *in personam* for money lent or promised, with a sponsion and a restipulation *calumniarum causa* (see IV. 178).
- (3) Actions of any kind, where the proper matter was converted into a pecuniary sum by the introduction of a sponsion, and wherein there was also a restipulation.
- (4) Actions *in rem* or *in personam* without a sponsion attached.

Heffter defends his introduction of the fourth class by saying that the words of Gaius only state that there were four classes of actions distinguished by their various connection (or want of connection) with sponsions, and not that all classes of necessity contained a sponsion.

See Heffter's *Observations on Gai.* IV. pp. 85—89.

<sup>1</sup> For example, (taking Heffter's classification in the last note,) actions *in rem pro praede litis et vindictarum* are not a separate *genus*, but only a *species* comprised in the *genus*, actions *in rem*.

<sup>2</sup> IV. 41.

<sup>3</sup> *Usus* is not treated of by Gaius, but a discussion of it is to be found in Just. *Inst.* II. 5.

<sup>4</sup> That is, the opponent in his *intentio* alleges that these rights do not belong to the claimant. Cf. Just. *Inst.* IV. 6. 2, with Sandars' note thereon, and D. 8. 5. 2. pr.

rem nostram ab alio ita petere, SI PARET EUM DARE OPORTERE : nec enim quod nostrum est, nobis dari potest, cum solum id dari nobis intelligatur quod *ita datur, ut* nostrum fiat ; nec res quae *est nostra*, nostra amplius fieri potest. plane odio furum, quo magis pluribus actionibus teneantur, effectum est, ut extra poenam dupli aut quadrupli rei recipiendae nomine fures ex hac actione etiam teneantur, SI PARET EOS DARE OPORTERE, quamvis sit etiam adversus eos haec actio qua rem nostram esse petimus. (5.) Appellantur autem in rem quidem actiones vindicationes ; in personam vero actiones quibus dare fieri oportere intendimus, conductiones.

6. Agimus autem interdum, ut rem tantum consequamur, interdum ut poenam tantum, alias ut rem et poenam. (7.) Rem tantum persequimur velut actionibus *quibus* ex contractu

we cannot sue another person for a thing that is ours in this form : "Should it appear that he ought to give it," for that cannot be given to us which is ours, inasmuch as that only can be looked upon as a gift to us, which is given for the express purpose of becoming ours ; nor can a thing which is ours become ours more than it already is. But from a detestation of thieves, in order that they may be made liable to a greater number of actions, it has been settled that besides the penalty of double or quadruple the amount (of the thing stolen), thieves may, with the object of recovering the thing, also be made liable under the action running thus : "Should it appear that they ought to give the thing<sup>1</sup> ;" although there also lies against them the form of action whereby we sue for a thing on the ground that it is our own<sup>2</sup>. 5. Now actions *in rem* are called *vindications*, whilst actions *in personam*, wherein we assert that our opponent ought to give us something, or that something ought to be done by him<sup>3</sup>, are called *condictions*.

6. Sometimes the object of our action is to recover only the thing itself, sometimes only a penalty, sometimes both the thing and a penalty. 7. We sue for the thing only, as in actions

<sup>1</sup> Sc. a *condictio*.

<sup>2</sup> Sc. a *vindicatio*.

<sup>3</sup> Savigny says that *Dare*, in the strict terminology of the formulary system, means to transfer property *ex jure Quiritium* ; whilst *Facere*, on

the other hand, embraces every kind of act, whether juridical or not, and hence comprises, amongst other things, *dare, solvere, numerare, ambulare, reddere, non facere, curare ne fiat*. Cf. D. 50. 16. 175, 189, 218.

agimus. (8.) Poenam tantum consequimur velut actione furti et iniuriarum, et secundum quorundam opinionem *actione vi bonorum raptorum*; nam ipsius rei et vindicatio et condictio nobis competit. (9.) Rem vero et poenam persequimur velut ex his causis ex quibus adversus infitiantem in duplum agimus: quod accidit per actionem iudicati, depensi, damni iniuriae legis Aquiliae, et rerum legatarum nomine quae per damnationem certae relictæ sunt.

10. Quaedam praeterea sunt actiones quae ad legis actionem exprimuntur, quaedam sua vi ac potestate constant. quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

11. Actiones quas in usu veteres habuerunt legis actiones appellabantur, vel ideo quod legibus proditæ erant, quippe tunc edicta Praetoris quibus complures actiones introductæ

arising out of a contract. 8. We obtain a penalty only, as in the actions *furti*<sup>1</sup> and *iniuriarum*<sup>2</sup>, and, according to the views of some lawyers, in the action *vi bonorum raptorum*<sup>3</sup>, for to recover the thing itself there lies for us either a vindication or a condictio. 9. We sue for the thing and a penalty in those cases, for example, where we bring our action for double the amount against an opponent who denies (the fact we state): instances of which are to be found in the actions *iudicati*<sup>4</sup>, *depensi*<sup>5</sup>, *damni iniuriae* under the Lex Aquilia<sup>6</sup>, and for the recovery of legacies where certain specific things have been left (by the form) *per damnationem*<sup>7</sup>.

10. Moreover, there are some actions which are framed upon a *legis actio*, whilst others rest on their own special force<sup>8</sup>. In order to make this clear we must give some preliminary account of the *legis actiones*.

11. The actions which our ancestors were accustomed to use were called *legis actiones*<sup>9</sup>, either from the fact of their being declared by *leges*, for in those times the Praetor's edicts,

<sup>1</sup> III. 189.

<sup>2</sup> III. 220.

<sup>3</sup> III. 209.

<sup>4</sup> IV. 21, 25. See for an instance of this action Cic. *pro Flacc.* c. XXI.

<sup>5</sup> III. 127.

<sup>6</sup> III. 216.

<sup>7</sup> II. 201—208, 282.

<sup>8</sup> IV. 32, 33.

<sup>9</sup> See the derivation given by Pomponius to the same effect, D. 1. 2. 6.

sunt nondum in usu habebantur ; vel ideo quia ipsarum legum verbis accommodatae erant, et ideo immutabiles proinde atque leges observabantur. unde cum quis de vitibus succisis ita egisset, ut in actione vites nominaret, responsum est eum rem perdidisse, quia debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio competeret, generaliter de arboribus succisis loqueretur. (12.) Lege autem agebatur modis quinque : sacramento, per iudicis postulationem, per conductionem, per manus iniectionem, per pignoris captionem.

13. Sacramenti actio generalis erat : *de* quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur. eaque actio perinde periculosa erat falsi nomine, atque hoc tempore periculosa est actio certae creditae pecuniae propter sponsionem qua periclitatur reus, si temere neget, et restipulationem qua periclitatur actor, si non debitum petat : nam

whereby very many actions have been introduced, were not in use ; or from the fact that they were adapted to the words of the *leges* themselves, and so were adhered to as inflexibly as those *leges* were. Hence, when in an action for vines having been cut down, the plaintiff used the word *vites* in his plaint, it was held that he must lose the cause ; because he ought to have used the word *arbores*, inasmuch as the law of the Twelve Tables, on which lay the action for vines cut down, spoke generally of trees (*arbores*) cut down'. 12. The *legis actiones*, then, were sued out in five ways : by *sacramentum*, by *iudicis postulatio*, by *condictio*, by *manus injectio*, by *pignoris captio*.

13. The *actio sacramenti* was a general one, for in all cases where there was no provision made in any *lex* for proceeding in another way, the form was by *sacramentum*<sup>1</sup> : and this action was then just as perilous in the case of fraud, as at the present day is the action "for a definite sum of money lent", on account of the sponsion whereby the defendant is imperilled, if he oppose the plaintiff's claim without good

<sup>1</sup> See D. 43. 27, where, however, the old law is only referred to, not quoted.

<sup>2</sup> According to Varro (*de Ling. Lat.* v. § 180, p. 70, Müller's edition) the name *sacramentum* was derived from the place of deposit, a temple ; for it would seem t' at in

the most ancient times the deposit was actually staked in the hands of the magistrate, and that the practice of giving sureties instead was an innovation of a later age.

<sup>3</sup> An action, that is to say, under the Lex Silia. See note on IV. 1.

### *Poena Sacramenti.*

qui victus erat summam sacramenti praestabat poenae nomine ; *eaque in publicum cedebat praedesque eo nomine Praetori dabantur*, non ut nunc sponsionis et restipulationis poena lucro cedit adversario qui vicerit. (14.) Poena autem sacramenti aut quingenaria erat aut quinquagenaria. *nam* de rebus mille aeris plurisve quingentis assibus, de minoris *vero* quinquaginta assibus sacramento contendebatur ; nam *ita* lege XII tabularum cautum erat. *sed si de libertate hominis controversia erat*, etsi pretiosissimus homo esset, tamen ut L assibus sacramento contenderetur, *eadem* lege cautum est *favoris causa, ne satisfactione onerarentur adsertores*. (15.) [*Nunc admonendi sumus, istas omnes actiones certis quibusdam et solemnibus verbis*

reason, and on account of the restipulation whereby the plaintiff is imperilled if the sum in dispute be not due ; for he who had lost the suit was liable by way of penalty to the amount of the deposit, which went to the treasury, and for the securing of which sureties were given to the Praetor : the penalty not going at that time, as does the sponsional and restipulatory penalty now, into the pocket of the successful party. 14. Now the penal sum of the *sacramentum* was either one of five hundred or one of fifty (*asses*). For when the suit was for things of the value of a thousand *asses* or more, the deposit would be five hundred, but when it was for less, it would be fifty : for thus it was enacted by a law of the 'Twelve Tables'. If, however, the suit related to the liberty of a man, although a man is valuable beyond all things, yet it was enacted by the same law that the suit should be carried on with a deposit of fifty *asses*, with the view of favouring such suits<sup>1</sup>, and in order to prevent the asserters of liberty<sup>2</sup> being burdened with excessive security. 15.<sup>3</sup> We must now be reminded that all these actions were of necessity carried on

<sup>1</sup> Tab. II. I. 1.

<sup>2</sup> For this phrase, *favoris causa*, used in a similar sense, see D. 23. 3. 74, and D. 50. 4. 8.

<sup>3</sup> *Adsertores* = the friends who came forward on behalf of the man held in servitude, who of course, from the disability of his status, could do nothing for himself. Cf. Plaut. *Cure.* V. 2. 68. Terent. *Adolph.* II.

1. 40 ; Suet. *Caes.* 80.

<sup>4</sup> We have adopted in the opening of this paragraph, down to the words "ad iudicem accipiendum venirent," the conjectural reading of Heffter. The reading may be right or not, (its sense is undoubtedly accordant with what we know of the ancient law,) but at all events it renders the passage more complete.

*peragi debuisset. Si verbi gratia in personam agebatur contra eum qui nexu se obligaverat, actor cum apud Praetorem ita interrogabat: Quando in iure te conspicio, postulo an fias auctor, qua de re nexum mecum fecisti? Et altero negante, ille dicebat: Quando negas, sacramento quingenario te provo, si propter te fidemve tuam captus fraudatusve sim. Deinde adversarius quoque dicebat: Quando ais neque negas me nexum*  
*, qua de re agitur, similiter ego te sacramento*  
*co, si propter me fidemve meam captus fraudatusve no*  
*Quibus ab utraque parte peractis litigatores*  
*iudicem, et Praetor ipsis diem praestituebat, quæ ad iudi-*  
*cem accipiendum venirent. postea vero reversis dabatur e*

in special and formal language. If, for instance, the action were one in *personam* against an individual who had bound himself by a legal obligation<sup>1</sup>, the plaintiff used to interrogate him in the Praetor's presence in this form: "As I see you in court, I demand whether you give consent<sup>2</sup> to (the settlement of) the matter in respect of which you have entered into an obligation with me?" Then on this person's refusal the plaintiff went on thus: "Since you say no, I challenge you in a deposit of five hundred (*asses*), if I have been deceived and defrauded through you and through trust in you." Then the opposite party also had his say, thus: "Since you assert and do not deny that I have entered into a legal engagement with you in relation to the subject matter of this action, I too challenge you with a deposit of five hundred (*asses*), in case you have not been deceived or defrauded through me or through trust in me." At the close of these proceedings on either side, the parties demanded a *iudex*, and the Praetor fixed a day for them to come and receive one. Afterwards, on their reappearance in court, a *iudex* was assigned from the number of the *decemviri* on the thirtieth day<sup>3</sup>: and this was

<sup>1</sup> See note on II. 17.

<sup>2</sup> That this was the form of the ancient action against an *auctor* who was present in court is clear from Cicero *pro Caelina*, c. 19, *pro Muræna*, c. 11.

*Auctor*, in the language of the old lawyers, was the individual who was bound by any engagement, contract—according to the forms of the civil law, to perform some specific act or

to give some specific thing and all its interest and profits. In the present case the defendant would become *auctor* by admitting his liability, for this admission would make him a *reus promittendi* in a stipulatory engagement.

<sup>3</sup> This is a difficult passage on account of the obliterated state of the MS. We have again adhered to Heffler's conjectural reading, viz. *decemviri xxx* (die).

*Xviris xxx iudex: idque per legem Pinariam factum est; ante eam autem legem nondum dabatur iudex. illud ex superioribus intelligimus, si de re minoris quam M aeris agebatur, quinquagenario sacramento, non quingenario eos contendere solitos fuisse. postea tamen quam iudex datus esset, comperendum diem, ut ad iudicem venirent, denuntiabant. deinde cum ad iudicem venerant, antequam aput eum causam perorarent, solebant breviter ei et quasi per indicem rem exponere: quae dicebatur causae collectio, quasi causae suae in breve coactio.* (16.) Si in rem agebatur, mobilia quidem et moventia, quae

so done in accordance with the Lex Pinaria<sup>1</sup>; for before the passing of that *lex*, it was not the practice for a *iudex* to be assigned<sup>2</sup>. From what has been stated above, we have gathered that when the dispute was in respect of a matter of smaller value than one thousand *asses*, the parties were wont to join issue with a deposit of fifty and not five hundred *asses*. Next, when their *iudex* had been assigned to them, they used to give notice, each to the other, to come before him on the next day but one. Then, when they had made their appearance before the *iudex*, their custom was, before they argued out their cause, to set forth the matter to him briefly, and, as it were, in outline: and this was termed *causae collectio*<sup>3</sup>, being, so to speak, a brief epitome of each party's case. 16. If the action were one *in rem*, the process by which the claim used to be made in court<sup>4</sup> for moveable and moving things

<sup>1</sup> See note (K) in Appendix.

<sup>2</sup> This translation is in accordance with Heffter's emendation of *nondum*; Hollweg reads *statim*; Huschke, who has filled up the preceding lacuna differently from Heffter, would supply *us e decemviris*.

<sup>3</sup> See note (L) in Appendix.

<sup>4</sup> In later times there was another form of proceeding, viz. *ex jure*, which is the one specially ridiculed by Cicero in *pro Mur.* c. 12. The process (technically called *manus conserctio*) is fully described in both its forms by Aulus Gellius, XX. 10, the sum of whose observations may be thus given: "By the phrase *manuum conserere* is meant the claiming of a matter in dispute by both litigants in a set form of words and

with the thing itself before them. This presence of the thing was absolutely necessary according to a Law of the Twelve Tables commencing: *Si quis in jure manum conseruit* (Tab. IV. l. 5), and the proceedings (*judicia, manus correctio*) must take place before the praetor." Hence we see that in olden times the praetor must have gone with the parties to the land, when land was the subject of dispute, although moveables may possibly, and probably, have been brought by them to him. Gellius proceeds: "But when from the extension of the Roman territory and the increase of their other business, the praetors found it inconvenient to go with the parties to distant places to take part in these proceedings, a practice



modo in ius adferri adducive possent, in iure vindicabantur ad hunc modum. qui vindicabat festucam tenebat. deinde ipsam rem adprehendebat, velut hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM SICUT DIXI. ECCE TIBI VINDICTAM INPOSUI: et simul homini festucam inponebat. adversarius eadem similiter dicebat et faciebat. cum uterque vindicasset, Praetor dicebat: MITTITE AMBO HOMINEM. illi mittebant. qui prior vindicaverat, ita alterum interrogabat: POSTULO ANNE DICAS QUA EX CAUSA VINDICAVERIS. ille respondebat: IUS PEREGI SICUT VINDICTAM INPOSUI. deinde qui prior vindicaverat dicebat: QUANDO TU INIURIA VINDICAVISTI, D AERIS SACRAMENTO

that could be brought or led into court, was as follows: the claimant, having a wand in his hand, laid hold of the thing claimed, say for instance, a slave, and uttered these words: "I assert that this slave is mine *ex jure Quiritium*, in accordance with his *status*<sup>1</sup>, as I have declared it. Look you, I lay my wand upon him:" and at the same moment he laid his wand on the slave. Then his opponent spoke and acted in precisely the same way; and each having made his claim the Praetor said: "Let go the slave, both of you." On which they let him go, and he who was the first claimant thus interrogated the other: "I ask you whether you can state the grounds of your claim." To that his opponent replied: "I have fully complied with the law inasmuch as I have touched him with my wand." Then the first claimant said: "Inasmuch as you have made a claim without law to support it, I challenge you in a deposit of five hundred *asses*." "And

(although contrary to the directions of the Twelve Tables,) that the *consertio manus* should no longer be done before the praetor (*in jure*), but that the parties should challenge one another to its performance without his presence (*ex jure*). They then went to the land together, and bringing back a clod therefrom, made their claim over that clod alone in the praetor's presence, in the name of the entire field." This method is referred to by Festus (sub verb. *vindiciae*), "*Vindiciae olim dicebantur illae (glebae) quae ex fundo sumtae in jus*

*allatae erant.*" In Cicero's time the proceedings seem to have been still more fictitious: the litigants went out of court, nominally *ut consererent manus*, but returned after a few minutes' absence, feigning that the *consertio* had in the meantime taken place, and then the rest of the process followed as set down by Gaius in the text.

<sup>1</sup> For this meaning of *causa*, see l. 138, II. 137. In D. 1. 8. 6. pr.; D. 22. 6. 3. pr.; D. 8. 2. 28, the word has the same or an analogous



TE PROVOCO. adversarius quoque dicebat: SIMILITER EGO TE. seu L asses sacramenti nominabant. deinde *eadem* sequebantur quae cum in personam ageretur. Postea Praetor secundum alterum eorum vindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes adversario dare litis et vindiciarum, id est rei et fructuum: alios autem praedes ipse Praetor ab utroque accipiebat sacramenti, quod id in publicum cedebat. festuca autem utebantur quasi hastae loco, signo quodam iusti domini: *maxime enim* sua esse credebant quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta praepositur. (17.) Si qua res talis erat, ut *non* sine incommodo posset in ius adferri vel adduci, velut si columna aut grex alicuius pecoris esset, pars aliqua inde sumebatur. deinde in eam partem quasi

"I too challenge you," said his opponent. Or the amount of the deposit they named might be fifty *asses*. Then followed the rest of the proceedings exactly as in an action *in personam*<sup>1</sup>. Next the Praetor used to assign the *vindiciae* to one or other of the parties, that is, give interim possession of the thing sued for to one of them, ordering him at the same time to provide his adversary with sureties *litis et vindiciarum*<sup>2</sup>, i.e. for the thing in dispute and its profits. The Praetor also took other sureties<sup>3</sup> for the deposit from both parties, because that deposit<sup>4</sup> went to the treasury<sup>5</sup>. The litigants made use of a wand instead of the spear, which was the symbol of legal ownership; for men considered those things above all others to be their own which they took from the enemy: and this is the reason why the spear is set up in front of the Centumviral Courts<sup>6</sup>. 17. When the thing in dispute was of such a nature that it could not be brought or led into court without inconvenience, for instance if it were a column, or a flock or herd of some

<sup>1</sup> IV. 15.

<sup>2</sup> Festus says: "*Vindiciae* was the term applied to those things which were the subjects of a lawsuit, although the suit, to speak more correctly, was about the right which the *vindiciae* (the clod, tile, &c.) symbolically represented." Festus, sub verb. *vindiciae*.

<sup>3</sup> *Praes* is a person who binds himself to the state (becomes bail, for instance, for the payment of the *sacramentum*), and is so called because when interrogated by the magistrate

if he be *praes*, i.e. ready and willing to be surety, he replies *praes* or *praesum*, I am ready. Festus, sub verb.

<sup>4</sup> We keep to the translation "deposit" because that term is a convenient one; but it is to be remembered that it was only in very early times that a deposit really took place, and that at the time of which Gaius is treating, sureties were given, but nothing actually deposited.

<sup>5</sup> IV. 13.

<sup>6</sup> IV. 31. See (K) in Appendix.

in totam rem praesentem fiebat vindicatio. itaque ex grege vel una ovis aut capra in ius adducebatur, vel etiam pilus inde sumebatur et in ius adferebatur; ex nave vero et columna aliqua pars defringebatur. similiter si de fundo vel de aedibus sive de hereditate controversia erat, pars aliqua inde sumebatur et in ius adferebatur et in eam partem perinde atque in totam rem praesentem fiebat vindicatio: velut ex fundo gleba sumebatur et ex aedibus tegula, et si de hereditate controversia erat, aeque [*folium deperditum*]. — — Enimvero modum *capie*ndi iudicis observabant, qui etiam ad iudicem tulandum adhibitus est, denique *condictio* autem appellari a lege Varia.

18. Et haec quidem actio proprie *condictio* vocabatur: nam actor adversario denuntiabat, ut ad iudicem capiendum die xxx adesset. nunc vero non proprie *condictionem* dicimus ac-

kind of cattle, some portion was taken therefrom, and the claim was made upon that portion, as though upon the whole thing actually present in court. Thus, one sheep or one goat out of a flock was led into court, or even a lock of wool from the same was brought thither: whilst from a ship or a column some portion was broken off. So, too, if the dispute were about a field, or a house, or an inheritance, some part was taken therefrom and brought into court, and the claim was made upon that part as though it were upon the whole thing there present; thus for instance, a clod was taken from the field, or a tile from the house, and if the dispute were about an inheritance, in like manner'.....

.....Our ancestors had in use a form, called *capie*ndi iudicis, almost identical with that employed in the *iudicis postulatio*: and this at a later time, after the passing of the Lex Varia<sup>1</sup>, was called a *condictio*. 18. And it was with propriety so called, for the plaintiff used to give notice to his opponent to be in court on the thirtieth day for the purpose of taking a *judex*<sup>2</sup>. At the

<sup>1</sup> An entire leaf of the MS. is missing here. Göschen is of opinion that the matter thus lost comprised, 1st, the remaining portion of the *actio sacramenti*: and, an exposition of the action *per iudicis postulationem*; 3rd, the commencement of that

which is carried on in the three following paragraphs, viz. the form of an action *per con*ditionem.

<sup>2</sup> These words are filled in according to a conjectural reading of Heffter's, inserted in the text above.

<sup>3</sup> "Condicere est denuntiare prisci

## *Condictio and Manus Injunctio.*

tionem in personam esse, qua intendimus dare nobis oportere: nulla enim hoc tempore eo nomine denuntiatio fit. (19.) Haec autem legis actio constituta est per legem Siliam et Calpurniam: lege quidem Silia certae pecuniae, lege vero Calpurnia de omni certa re. (20.) Quare autem haec actio desiderata sit, cum de eo quod nobis dari oportet potuerimus sacramento aut per iudicis postulationem agere, valde quaeritur.

21. Per manus iniectionem aeque de his rebus agebatur, de quibus ut ita ageretur, lege aliqua cautum est, velut iudicati lege XII tabularum. quae actio talis erat. qui agebat sic dicebat: QUOD TU MIHI IUDICATUS SIVE DAMNATUS ES SESTERTIUM X

present time, however, we apply the name, *condictio*, improperly to an action *in personam* in the *intentio* of which we declare that our opponent ought to give something to us, for now-a-days no *denuntiatio* takes place for such purpose. 19. This *legis actio* was given by the Leges Silia and Calpurnia; being by the Lex Silia applicable to the recovery of an ascertained sum of money, and by the Lex Calpurnia to that of any ascertained thing. 20. But why this action was needed it is very difficult to say, seeing that we could sue by the *sacramentum* or the action *per iudicis postulationem* for that which ought to be given to us<sup>1</sup>.

21. Similarly an action in the form of an arrest (*manus injectio*) lay for those cases where it was specified in any<sup>2</sup> *lex* that this should be the remedy; as in the case of an action upon a judgment which was given by a law of the Twelve Tables<sup>3</sup>. That action was of this nature: he who brought it uttered these words: "Inasmuch as you have been adjudicated or condemned to pay me ten thousand sesterces and have withheld the money fraudulently<sup>4</sup>, I therefore lay my hands upon you for ten thousand sesterces, a debt due on

lingua." Just. Inst. IV. 6. 15. So also Festus: "Condicere est dicendo denuntiare. Condictio, in diem certum ejus rei quae agitur denuntia-

difficult to understand why the word *aeque* is introduced here, 2ndly, because of the next paragraph: "velut lege XII. Tabularum," 3rdly, because the reading accords with that in § 28 of this book.

<sup>1</sup> See note (M) in Appendix.

<sup>2</sup> We have here followed Göschen's reading: "lege aliqua cautum est," instead of Heffter's: "lege Aquilia cautum est;" 1stly, because, as the former says, it would otherwise be

<sup>3</sup> Tab. III. l. 3.

<sup>4</sup> The distinction between *dolus malus* and *dolus bonus*, the latter being lawful, is to be found in D. 4. 3. 1. 1—3.

MILIA QUAE DOLO *MALO* NON SOLVISTI, OB EAM REM EGO TIBI SESTERTIUM X MILIUM IUDICATI MANUS INICIO ; et simul aliquam partem corporis eius prendebat. nec licebat iudicato manum sibi depellere et pro se lege agere ; sed vindicem dabat, qui pro se causam agere solebat : qui vindicem non dabat, domum ducebatur ab actore et vinciebatur. (22.) Postea quaedam leges ex aliis quibusdam causis pro iudicato manus iniunctionem in quosdam dederunt : sicut lex Publilia in eum pro quo sponsor dependisset, si in sex mensibus proximis quam pro eo dependens esset non solvisset sponsori pecuniam ; item lex Furia de sponsu adversus eum qui a sponsore plus quam virilem partem exegisset ; et denique complures aliae leges in multis causis talem actionem dederunt. (23.) Sed aliae leges ex quibusdam causis constituerunt quasdam actiones per manus iniunctionem,

judgment : ” and at the same moment he laid hold of some part of his body ; nor was he against whom the judgment had been given allowed to remove the arrest and conduct his action for himself, but he named a protector (*vindex*)<sup>1</sup>, who managed the case for him : a defendant who did not name a protector was taken off by the plaintiff to his house and bound there. 22. Afterwards certain *leges* extended the action *per manus iniunctionem* “as though upon a judgment” to other cases against particular individuals : for instance, the Lex Publilia did so against him for whom a surety (*sponsor*)<sup>2</sup> had paid money, if he had not repaid it to the surety within the six months next after it had been paid for him : so, too, did the Lex Furia de Sponso<sup>3</sup> against him who had exacted from a surety (*sponsor*) more than his proportion of a debt : and in fact many other *leges* allowed an action of the kind in various cases. 23. Other *leges* again allowed in certain cases actions *per manus iniunctionem*, but (made them)

<sup>1</sup> See IV. 46. Boethius, *ad Cic. Top.* I. 2, § 10 says : “Vindex est qui alterius causam suscipit vindicandam.” There is a curious law of the Twelve Tables on this subject, “Assiduo vindex assiduus esto ; proletario quoi quis volet vindex esto,” Tab. I. l. 4 ; in which passage

*duus* is to be interpreted

Festus thus defines *vindex* : “Vindex ab eo, quod vindicat, quominus is qui pressus est ab aliquo teneatur.”

<sup>2</sup> III. 127.

<sup>3</sup> For an account of this law, see III. 121, 122.

sed puram, id est non pro iudicato: velut lex *Furia* testamentaria adversus eum qui legatorum nomine mortisve causa plus *M* assibus cepisset, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex *Marcia* adversus faeneratores, ut si usuras exegissent, de his reddendis per manus iniunctionem cum eis ageretur. (24.) Ex quibus legibus, et si quae aliae similes essent, cum agebatur, manum sibi depellere et pro se lege agere *licebat*. nam et actor in ipsa legis actione non adiciebat hoc verbum PRO IUDICATO, sed nominata causa ex qua agebat, ita dicebat: OB EAM REM EGO TIBI MANUM INICIO; cum hi quibus pro iudicato actio data erat, nominata causa ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO IUDICATO MANUM INICIO. nec me praeterit in forma legis *Furiae* testamentariae PRO IUDICATO verbum inseri, cum in ipsa lege non sit: quod videtur nulla ratione factum. (25.) Sed postea lege

substantive, i.e. not "as though upon a judgment:" for example, the Lex *Furia Testamentaria* did so against a man who had taken more than a thousand *asses* by way of legacy or donation *mortis causâ*<sup>1</sup>, in spite of his not being privileged<sup>2</sup> by the *lex* so as to have the right of taking such larger sum: thus also the Lex *Marcia* allowed this action against usurers, so that if they exacted usurious interest, proceedings for restitution of the same could be taken against them by the form *per manus injectionem*. 24. When then an action was brought upon these *leges* and others like them, the defendant was at liberty to remove the arrest and conduct his action for himself, for the plaintiff did not in the *legis actio* add the phrase *pro iudicato* ("as though upon a judgment"), but specifying the reason why he sued, went on thus: "on that account I lay my hand on you:" whereas they to whom the action was given "as though upon a judgment," after specifying the reason why they were suing, proceeded thus: "on that account I arrest you as though upon a judgment." I have not, however, forgotten that in the form based on the Lex *Furia Testamentaria* the phrase, *pro iudicato*, is inserted, though it does not appear in the *lex* itself; but that insertion seems founded on no reason. 25. Afterwards, however, permission was

<sup>1</sup> See Just. *Inst.* II. 7. 1.

<sup>2</sup> II. 225. Ulp. 1. 2.

## *Pignoris Capio.*

*Varia*, excepto iudicato et eo pro quo depensum est, ceteris omnibus cum quibus per manus iniectionem agebatur permis- sum est sibi manum depellere et pro se agere. itaque iudicatus et is pro quo depensum est etiam post hanc legem vindicem dare debebant, et nisi darent, domum ducebantur. idque quam- diu legis actiones in usu erant semper ita observabatur; unde nostris temporibus is cum quo iudicati depressive agitur iudica- tum solui satisfacere cogitur.

26. Per pignoris capionem lege agebatur de quibusdam re- bus moribus, *de quibusdam* lege. (27.) Introducta est moribus rei militaris. nam propter stipendium licebat militi ab eo qui distribuebat, nisi daret, pignus capere: dicebatur autem ea

given by the Lex Varia<sup>1</sup> to all other persons, save him against whom a judgment had passed and him for whom money had been paid (by a *sponsor*), when sued in the form *per manus iniectionem*, to remove the arrest and conduct their action for themselves. A judgment-debtor, therefore, and one for whom money had been paid were compelled, even after the passing of this *lex* to nominate a protector, and unless they did so they were carried off to the plaintiff's house. And this rule was always adhered to so long as *legis actiones* were in use: whence, even in our times, he who is defendant in an action either on a judgment or for money paid by a surety is compelled to give sureties<sup>2</sup> for the payment of that which shall be adjudicated<sup>3</sup>.

26. The *legis actio per pignoris capionem* was for some matters a remedy originating from old custom, for others one framed upon a *lex*. 27. That (*capio*) which dealt with mili- tary proceeds was the creation of custom. For a soldier was allowed to take a pledge from the paymaster for the due dis-

<sup>1</sup> *Varia* is Heffter's suggestion. The name is illegible in the MS.

<sup>2</sup> IV. 102.

<sup>3</sup> Those who desire further inform- ation on the subject of *manus injectio* are referred to Heffter's *Observations on Gai.* IV. pp. 15—17. It will be seen from a perusal thereof that Gaius' enumeration of the cases wherein such action is allowed is not exhaustive.

The oft-quoted laws, 1 and 2 of Tab. I. of the Twelve are not referred

to here, because they seem to treat of a somewhat different matter, viz. arrest of a defendant who refused to appear in court at all, whereas the present subject of our author is the arrest of one who had appeared in the original action, had lost it, and had then evaded payment of the judgment laid on him. For the same reason Hor. *Sat.* I. 9. 74 and the well-known passages from Plau- tus (*Curcul.* and *Pers.*) are not brought forward.

pecunia quae stipendii nomine dabatur aes militare. item propter eam pecuniam licebat pignus capere ex qua *equus* emendus erat: quae pecunia dicebatur aes equestre. item propter eam pecuniam ex qua hordeum equis erat comparandum; quae pecunia dicebatur aes hordiarium. (28.) Lege autem introducta est pignoris catio velut lege XII tabularum adversus eum qui hostiam emisset, nec pretium redderet: item adversus eum qui mercedem non redderet pro eo iumento quod quis ideo locasset, ut inde pecuniam acceptam in *daps*em, id est in sacrificium impenderet. item lege censoria data est pignoris catio publicanis vectigalium publicorum populi Romani adversus eos qui aliqua lege vectigalia deberent. (29.) Ex omnibus autem istis

charge of his pay: and the money which was given as pay was called "military proceeds" (*aes militare*). So, too, the cavalry soldier was allowed to take a pledge for the payment of the money necessary for the purchase of his charger, and this money was called *aes equestre*<sup>1</sup>. So also could these soldiers take a pledge for the money necessary for the purchase of provender for their chargers, and this was called *aes hordiarium*. 28. *Pignoris catio* was also (sometimes) introduced by *lex*, as, for instance, by a law of the 'Twelve Tables' against a man who purchased a victim for sacrifice and did not pay the price: as also against him who did not pay the hire of a beast of burden which some one had let out to him for the express purpose of expending the receipts therefrom on a *daps*, i.e. on a sacrificial feast<sup>2</sup>. So also a *pignoris catio* was given by a *lex censoria*<sup>3</sup> to the farmers of the public revenues of the Roman people against those who owed taxes under any *lex*. 29. In all these cases the pledge was taken with a set form of

<sup>1</sup> The money for purchasing the horses of the *equites* was provided by the state (Livy, i. 43), that for the feeding of them by widows; the pledge therefore would be taken in the former case, as for *aes militare*, from the *tribunus aerarius*, in the latter from the widow. See Aul. Gell. vii. 10.

<sup>2</sup> Tab. xii. l. 1.

<sup>3</sup> *Daps* was the archaic word for the sacred ceremonies at the winter

and spring sowing. See Festus, *verb.*

<sup>4</sup> This is Dirksen's suggestion, which Heffter adopts. Göschen proposes "*Lex Plaetoria*" for a reading; Mommsen, "*Lex praediatrica*." The *leges censoriae* referred chiefly to the letting out of the revenues, public lands and public works. For the concern of the censors in such matters see D. 50. 16. 203, Varro, *de R. R.* ii. 1.



causis certis verbis pignus capiebatur ; et ob id plerisque placebat hanc quoque actionem legis actionem esse. quibusdam autem *non* placebat : primum quod pignoris captio extra ius peragebatur, id est non aput Praetorem, plerumque etiam absente adversario, cum alioquin ceteris actionibus non aliter uti possent quam aput Praetorem praesente adversario : praeterea nefasto quoque die, id est quo non licebat lege agere, pignus capi poterat.

30. Sed istae omnes legis actiones paulatim in odium venerunt. namque ex nimia subtilitate veterum qui tunc iura condiderunt eo res perducta est, ut vel qui minimum errasset *item* perderet. itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones effectumque est, ut per concepta verba, id est per formulas litigaremus. (31.) Tantum ex duabus causis permissum est lege agere : damni infecti, et si centumvirale iudicium fit. proinde vel *hodie* cum ad centumviros itur, ante

words ; and hence it was generally held that this was a *legis actio* too : but some authorities have dissented from this view ; firstly, because the *pignoris captio* was a process transacted out of court, i.e. not before the Praetor, and generally too in the absence of the opposite party, whereas the plaintiff could not put other (*legis*) *actiones* in force except before the Praetor and in the presence of his opponent, and further because a pledge might be taken even on a *dies nefastus*, that is to say, on a day when it is not allowed to transact court-business.

30. All these *legis actiones*, however, by degrees fell into discredit, for through the excessive refinements of those who at that time determined<sup>1</sup> the law, matters got to such a pitch that a litigant who had made the very slightest error lost his cause<sup>2</sup>. Therefore these *legis actiones* were got rid of by the Lex Aebutia and the two Leges Juliae<sup>3</sup>, and the result has been that our litigious process is now carried on by express phraseology, i.e. by the *formulae*. 31. In two cases only are the litigants allowed to resort to a *legis actio*, viz. in the case of anticipated damage, and in that of an action appertaining to the centumviral jurisdiction<sup>4</sup>. In fact, even at the present day, when the parties resort to the *centumviri*, there

is used in this sense of determining or expounding in l. 7.

<sup>2</sup> See the example in IV. 11.

<sup>3</sup> See (K) in Appendix.

<sup>4</sup> See (K) in Appendix.



lege agitur sacramento aput Praetorem urbanum vel peregrinum. propter damni vero infecti nemo vult lege agere, sed potius stipulatione quae in edicto proposita est obligat adversarium *per magistratum*, quod *et* commodius ius *et* plenius est. per pignoris [*desunt* 24 *lin.*] apparet. (32.) Item in ea forma quae publicano proponitur talis fictio est, ut quanta pecunia olim, si pignus captum esset, id pignus is a quo captum erat luere deberet, tantam pecuniam condemnnetur. (33.) Nulla autem formula ad conductionis fictionem exprimitur. sive enim pecuniam sive rem aliquam certam debitam nobis petamus, eam ipsam dari nobis oportere intendimus; nec ullam adiungimus condic-

are preliminary proceedings in the form of the *actio sacramenti* before the Praetor Urbanus or Praetor Peregrinus<sup>1</sup>. In the case of anticipated damage, however, no one cares now to proceed by way of *legis actio*, but rather binds his opponent before a magistrate by the stipulation set forth in the edict (of the Praetor), for this process is at once more complete and more convenient.....<sup>2</sup>. 32. For instance, in the formula which is set forth for the benefit of a revenue-collector, there is a fiction to the effect that the defendant shall be condemned in such amount as in olden times, when a pledge was taken, he from whom that pledge had been taken would have had to ransom it at. 33. But no formula is framed on the fiction of a conduction, for whether we be suing for money or some ascertained thing due to us, we state in the *intentio* that such thing "ought to be given to us," without adding any

<sup>1</sup> IV. 65.

<sup>2</sup> Hefster has endeavoured to fill up the break of 24 lines occurring at this point: his suggested reading may be translated to this effect: "At the present day there is no proper *legis actio* in the form *per pignoris capio*, but only a fictitious process employed in certain actions; a result brought about by the *Lex Julia Iudiciaria*. Of these fictions there are many, attaching to statutable and civil actions. For there are actions so based on a fictitious *legis actio*, that we insert in the *condemnatio* the amount or act which our opponent would have had to give or perform,

if the *legis actio* provided for the purpose had been carried out in regular form. Hence we do not sue directly and upon the actual obligation, but indirectly upon the tie springing from the (supposed) *legis actio*. It is to be remembered, however, that we cannot now-a-days thus sue upon a fiction of *legis actio* in all cases where the old legal system allowed process by real *legis actio*, but only when the *legis actio* is of the form *per pignoris capionem* .. This appears from the formulae themselves, which the Praetor has set forth in his edict, for instance," &c. &c. (as in the text).

tionis fictionem. itaque simul intelligimus eas formulas quibus pecuniam aut rem aliquam nobis DARE OPORTERE intendimus, sua vi ac potestate valere. eiusdem naturae sunt actiones commodati, fiduciae, negotiorum gestorum et aliae innumerales.

34. Habemus adhuc alterius *etiam* generis fisiones in quibusdam formulis: velut cum is qui ex *edicto* bonorum possessionem *petiit* ficto se herede agit. cum enim praetorio iure et non legitimo succedat in locum defuncti, non habet *directas*

fictitious condiction. Hence we understand at once that those formulae in the *intentio* of which we declare that money or something "ought to be given to us" avail of their own special force. The same characteristic belongs to actions on loan, on fiduciary pact<sup>1</sup>, on gratuitous services<sup>2</sup>, and to other actions innumerable<sup>3</sup>.

34. We have besides fictions of another kind in some formulae: for instance when a person claims possession of goods<sup>4</sup> by the edict under the fiction that he is the heir. For since he succeeds to the position of the deceased by praetorian and not

<sup>1</sup> II. 59.

<sup>2</sup> See Mackenzie's *Roman Law*, p. 237.

<sup>3</sup> This topic of fictions is of importance as an introduction to the learning relating to the formulary system. Hence it is that Gaius has thought it necessary to give an elaborate account of the old *legis actiones*, which were, as we see, almost entirely obsolete in his day, and to explain the connection between one of the *legis actiones* and fictions on the one hand, and the influence of fictions in pleading upon the formulary system on the other. The whole subject of fictions has been analyzed very minutely and explained most thoroughly by Savigny in his *Syst. des Rom. Rechts*, (see the French translation by Guénoux, *Traité du droit Romain*, v. § CCXV. pp. 76—84.) Zimmern too has given a short chapter on the same subject as introductory to the formulary system, (see Zimmern translated by L. Etienne, *Traité*

*des Actions*: 2me partie, section ii. Art. premier. § I. p. 140.) The whole of Savigny's short chapter should be studied as explanatory of the sections of Gaius numbered from 34 to 60, and also as explanatory of the vast extension of pleading by the introduction of what were called *utiles actiones*, through the advantages which the use of fictions offered. One part however deserves special notice here, viz. where he points out the difference between *actiones fictitiae* and *actiones utiles*. "*Utilis actio* and *actio fictitia*," says he, "were originally exactly equivalent." Gaius using the term *utilis* and Ulpian the term *fictitia*. But there was this difference between them, that whereas *fictitia* directly expresses the form of procedure actually adopted, *utilis* expresses the very essence of the thing itself, that is to say, the extension of an institution owing to the practitioners' wants.

<sup>4</sup> III. 32 et seqq.

actiones, et neque id quod defuncti fuit potest intendere suum esse, neque id quod defuncto debebatur potest intendere dare sibi oportere; itaque ficto se herede intendit veluti hoc modo: IUDEx ESTO. SI AULUS AGERIUS, id est ipse actor, LUCIO TITIO HERES ESSET, TUM SI PARET FUNDUM DE QUO AGITUR EX IURE QUIRITIUM EIUS ESSE OPORTERE; vel si in personam agatur, praeposita similiter fictione illa ita subicitur: TUM SI PARET NUMERIUM NEGIDIUM AULO AGERIO SEXTERTIUM X MILIA DARE OPORTERE. (35.) Similiter et bonorum emptor ficto se herede agit, sed interdum et alio modo agere solet. nam ex persona eius cuius bona emerit sumpta intentione convertit condemnationem in suam personam, id est ut

by statutable right, he obtains no direct actions<sup>1</sup>, and cannot claim in his *intentio* either that what belonged to the deceased is "his own," or that his adversary "ought to give him" that which was owed to the deceased: therefore feigning himself heir, he states his *intentio* somewhat in this fashion: "Let there be a *judex*. If Aulus Agerius (that is the plaintiff himself) was the heir of Lucius Titius, then should it appear that that estate about which the action is brought is his *ex jure Quiritium*," &c.; or if the action be one *in personam*<sup>2</sup>, a similar fiction is prefixed, and the formula runs on: "Then should it appear that Numerius Negidius ought to give to Aulus Agerius 10,000 sesterces<sup>3</sup>." 35. So too the *bonorum emptor*<sup>4</sup> sues under the fiction of being heir. Sometimes, however, he sues in another way. For commencing with an *intentio* directed to the person of him

<sup>1</sup> That is, no action is specially provided for his claim by the civil law.

<sup>2</sup> We have translated Göschen's reading: "Si in personam agatur:" Hefster reads: "vel si quid debebatur L. Titio;" which of the two we adopt is immaterial, an action on a debt being, of necessity, in

<sup>3</sup> "The word *oportere*," says Paul, "does not apply to the extent of the *Judex's* powers, for he can give larger or smaller damages, but refers to the present value (of the subject matter of the agreement or claim), D. 50. 16. 37. Thus, sup- in a stipulatory contract be-

tween S. and T. the clause *Quidquid te dare facere oportet* were inserted; then in case of any dispute between the parties, the claim would be restricted to the actual sum that was due, or that the thing was worth at the time when the contract was made. See D. 45. 1. 65. 1 and 45. 1. 125.

"Hence," says Savigny, *Traité du droit Rom.* (translated by Guénoux, v. p. 88), "the expression *oportere* in the *intentio* must always be understood to apply to the actual existence of a debt arising out of some strictly legal engagement or transaction, and not to a debt that may result from a judicial decision."

<sup>4</sup> III. 77—81.

quod illius esset vel illi dare oporteret, eo nomine adversarius huic condemnetur: quae species actionis appellatur Rutiliana, quia a Praetore Publio Rutilio, qui et bonorum venditionem introduxisse dicitur, comparata est. superior autem species actionis qua ficto se herede bonorum emptor agit Serviana vocatur. (36.) *Eiusdem generis est quae Publiciana vocatur.* datur autem haec actio ei qui ex iusta causa traditam sibi rem nondum usucepit eamque amissa possessione petit. nam quia non potest eam ex iure Quiritium suam esse intendere, fingitur rem usucepisse, et ita, quasi ex iure Quiritium dominus factus esset, intendit hoc modo: IUDEx ESTO. SI QUEM HOMINEM AULUS AGERIUS EMIT, ET IS EI TRADITUS EST, ANNO POSSEDISSET, TUM SI EUM HOMINEM DE QUO AGITUR EIUS EX IURE QUIRITIUM ESSE OPORTERET et reliqua. (37.) Item civitas Romana

whose property he has bought, he changes the *condemnatio* so as to direct it to his own person, that is, he says that his opponent ought to be condemned to himself on account of what belonged to him (whose property he has bought,) or on account of what he was bound to give to him. This form of action is called *Rutilian*, because it was framed by the Praetor Rutilius, who is also said to have been the inventor of the proceeding called *bonorum venditio*<sup>1</sup>. The form of action first named, in which the *bonorum emptor* sues under the fiction of being the heir, is called *Servian*. (36.) Of the same kind is that action known as *Publician*<sup>2</sup>. This is granted to him who has not yet completed his usucapion<sup>3</sup> of something delivered to him on lawful grounds, and having lost the possession seeks to recover the thing. For inasmuch as he cannot declare that the thing is his *ex jure Quiritium*, he is by fiction assumed to have completed his usucapion, and thus, as though he had become owner *ex jure Quiritium*, his *intentio* runs in this manner: "Let there be a *judex*. If Aulus Agerius has possessed for a year the slave whom he bought and who was delivered to him, then if it should appear that that slave, about whom this action is brought, is his *ex jure Quiritium*, &c. (37.) Again, Roman citizenship

<sup>1</sup> III. 77.

<sup>2</sup> The author of this law is generally supposed to be the Praetor Publicius mentioned by Cicero in *pro Cluent. c. 45*. The peculiarities

of the action are discussed by Sandars in his notes on Just. *Inst.* IV. 6. 4.

<sup>3</sup> II. 41.

peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi, velut si furtum *faciat* peregrinus *et* cum eo agatur, formula ita concipitur: IUDEX ESTO. SI PARET OPE CONSILIOVE DIONIS HERMAEI LUCIO TITIO FURTUM FACTUM ESSE PATERAE AUREAE QUAM OB REM EUM, SI CIVIS ROMANUS ESSET, PRO FURE DAMNUM DECIDERE OPORTERET et reliqua. item si peregrinus furti agat, civitas ei Romana fingitur. similiter si ex lege Aquilia peregrinus damni iniuriæ agat aut cum eo agatur, ficta civitate Romana iudicium datur. (38.) Præterea aliquando fingimus adversarium nostrum *capite* diminutum non esse. nam si ex contractu nobis obligatus obligatæ sit et capite diminutus diminutæ fuerit, velut mulier per coemptionem, masculus per adrogationem, desinit iure civili

is by a fiction ascribed to a foreigner, if he sue or be sued in some case for which an action is granted by our laws, provided only it be just that such action should be extended to a foreigner<sup>1</sup>; for instance, if a foreigner commit a theft and an action be brought against him, the formula is framed thus: "Let there be a *iudex*. Should it appear that a theft of a golden goblet has been committed on Lucius Titius with the aid and counsel of Dio Hermaeus, for which matter, were he a Roman citizen, he would have to make satisfaction for the loss as though he were a thief," &c. Again, if a foreigner bring an action for theft, Roman citizenship is by fiction ascribed to him. Similarly, if a foreigner sue under the Lex Aquilia for damage done contrary to law, or if he be sued on such account, an action is granted to him on the fiction of his having Roman citizenship.

38. Besides this we sometimes feign that our adversary has not suffered a *capitis diminutio*<sup>2</sup>. For if any one, man or woman, be bound to us on a contract, and undergo *capitis diminutio*, as in the case of a woman by *coemptio*<sup>4</sup> or in that of a man by *arrogation*<sup>3</sup>, such person is no longer bound to us at

<sup>1</sup> There is an example of this fiction in Cic. *in Ferr.* II. 2. 12, "Judicia hujusmodi: qui cives Romani erant, si Siculi essent, quum Siculos eorum legibus dari oporteret. Qui Siculi, si cives Romani essent," etc.

<sup>2</sup> He was not the actual thief, but only an accomplice; but he was

liable to an action just as though he were the actual thief. Hence *pro* is here used in precisely the same signification as in the phrase *pro jactato*; IV. 22, 24, etc.

<sup>3</sup> I. 159.

<sup>4</sup> I. 113.

<sup>5</sup> I. 99.

debere nobis, nec directo intendere *possumus* dare eum eamve oportere; sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamve actio *utilis*, rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutave non esse.

39. Partes autem formularum hae sunt: demonstratio, intentio, adiudicatio, condemnatio. (40.) Demonstratio est ea pars formulae quae praecipue *ideo* inseritur, ut demonstretur res de qua agitur. velut haec pars formulae: QUOD AULUS AGERIUS NUMERIO NEGIDIO HOMINEM VENDIDIT. item haec: QUOD AULUS AGERIUS APUT NUMERIUM NEGIDIUM HOMINEM DEPOSUIT. (41.) Intentio est ea pars formulae qua actor desiderium suum concludit. velut haec pars formulae: SI PARET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTERE. item haec: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTERE. item haec: SI PARET HOMINEM EX IURE QUIRITIUM AULI AGERII ESSE. (42.) Adiudicatio

the civil law<sup>1</sup>, nor can we declare directly in our *intentio* that he or she "ought to give:" but to prevent either of them having the power of destroying our right, an *utilis actio*<sup>2</sup> has been introduced against them, in which their *capitis diminutio* is set aside, in which, that is to say, there is a fiction that they have not suffered any *capitis diminutio*<sup>3</sup>.

39. Now the parts of a formula<sup>4</sup> are these, the *demonstratio*, the *intentio*, the *adiudicatio* and the *condemnatio*. 40. The *demonstratio* is that part of a formula which is inserted for the express purpose of having the matter described about which the action is brought; for example, this part of a formula; "Inasmuch as Aulus Agerius sold a slave to Numerius Negidius:" or this: "Inasmuch as Aulus Agerius deposited a slave with Numerius Negidius." 41. The *intentio* is the part of a formula in which the plaintiff declares his demand: for instance, this part of a formula: "If it appear that Numerius Negidius ought to give to Aulus Agerius 10,000 sesterces;" or this: "whatever it appear that Numerius Negidius ought to give or do for Aulus Agerius;" or this: "if it appear that the slave belongs to Aulus Agerius *ex jure Quiritium*."<sup>5</sup> 42. The *adiudicatio* is that part of a

<sup>1</sup> III. 84.

<sup>2</sup> II. 78 (note).

<sup>3</sup> IV. 80.

<sup>4</sup> A short and clear exposition of the nature of a formula is to be found

in Sandars' *Introduction to the Institutes*, pp. 63—67. See also Lindley's *Jurisprudence*, App. p. xxxv.

<sup>5</sup> These examples are well selected,

est ea pars formulae qua permittitur iudici rem alicui ex litigatoribus adiudicare: velut si inter coheredes familiae erciscundae agatur, aut inter socios communi dividundo, aut inter vicinos finium regundorum. nam illic *ita est*: QUANTUM ADIUDICARI OPORTET, IUDEX TITIO ADIUDICATO. (43.) Condemnatio est ea pars formulae, qua iudici condemnandi absolvendive potestas permittitur. velut haec pars formulae: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET ABSOLVE. item haec: IUDEX NUMERIUM NEGIDIUM AULO AGERIO DUMTAXAT X MILIA CONDEMNA. SI NON PARET ABSOLVITO. item haec: IUDEX NUMERIUM NEGIDIUM AULO AGERIO [X MILIA] CONDEMNATO et reliqua, ut non adiciatur —. (44.) Non *tamen* istae omnes partes

formula in which the *iudex* is permitted to adjudicate something to one of the litigants, as in the suit between coheirs for partition of the inheritance, or between partners for a division of the partnership effects, or between neighbouring proprietors for a setting out of their boundaries. For in such cases this part of the formula runs: "Let the *iudex* adjudicate to Titius as much as ought to be adjudicated<sup>1</sup>." 43. The *condemnatio* is that part of a formula in which power is granted to the *iudex* to condemn (*i. e.* mulct) or acquit<sup>2</sup>: for instance, this part of a formula: "*Judex*, condemn Numerius Negidius to pay 10,000 sesterces to Aulus Agerius; if it do not appear (that the circumstances put forth in the *intentio* are true) acquit him;" or this: "*Judex*, condemn Numerius Negidius to pay to Aulus Agerius a sum not exceeding 10,000 sesterces; if it do not appear (that the circumstances set forth in the *intentio* are true) acquit him;" or this: "*Judex*, condemn Numerius Negidius to pay 10,000 sesterces to Aulus Agerius," &c.<sup>3</sup>... without the addition. 44. All

being examples of the *intentiones* of the three most common forms of action, viz. the first an *intentio* suitable for an *actio in personam* of the character described as *certae condemnationis*, the second for an *actio in personam* of the class *incertae condemnationis*; the third for an *actio in rem*.

<sup>1</sup> See Just. *Inst.* IV. 17. 4—7; Ulp. X. 16.

<sup>2</sup> IV. 48 et seqq.

<sup>3</sup> Heffter and Göschen read "ut

non adjiciatur: SI NON PARET, ABSOLVITO," the MS. being illegible at this point. Dirksen, however, thoroughly objects to this addition, on the ground that the *condemnatio* always contained an express direction to the *iudex* to condemn or acquit. It is perhaps presumptuous to dispute with such authorities as Heffter and Göschen, but we must say that Dirksen's objection to their reading seems unanswerable: for we



### *Formulae in Jus conceptae.*

simul inveniuntur, sed quaedam inveniuntur, quaedam non inveniuntur. certe intentio aliquando sola invenitur, sicut in praedjudicialibus formulis, qualis est qua *quaeritur* an aliquis libertus sit, vel quanta dos sit, et aliae complures. demonstratio autem et adjudicatio et condemnatio numquam solae inveniuntur, nihil enim omnino sine intentione vel condemnatione valet; item *condemnatio vel adjudicatio sine demonstratione vel intentione* nullas vires habet, et ob id numquam solae inveniuntur.

45. Sed eas quidem formulas in quibus de iure quaeritur *in ius* conceptas vocamus. quales sunt quibus intendimus nostrum esse aliquid ex iure Quiritium, aut nobis dare oportere, aut pro fure damnum *decidere oportere*; in quibus iuris civilis intentio est. (46.) Ceteras vero in factum

these parts, however, are not always found together in the same formula, but some appear and some do not appear. Of a certainty the *intentio* is sometimes found alone, as in praedjudicial formulae<sup>1</sup>, such, for instance, as that wherein the matter in issue is whether a man is a *libertus*, or that where it is what is the amount of a *dos*<sup>2</sup>, and many others. But the *demonstratio*, the *adjudicatio* and the *condemnatio* are never found alone: for the *demonstratio* is utterly useless without an *intentio* or a *condemnatio*; and so too a *condemnatio* or *adjudicatio* is of no effect without a *demonstratio* or an *intentio*<sup>3</sup>: therefore these are never found alone.

45. Now those formulae wherein the issue is one about a right, we call *in jus conceptae*. Of this kind are those in which we lay our *intentio* to the effect that something is ours *ex iure Quiritium*, or that some one ought to give us something, or ought to pay damages as for a *furtum*<sup>4</sup>. In these the *intentio* is one of the civil law<sup>5</sup>. 46. All other formulae we style *in*

find it expressly stated by Paulus "qui damnare potest, is absolvendi quoque potestatem habet;" D. 42. 1. 3. Gaius, too, says himself in IV. 114: "vulgo dicitur omnia iudicia esse absolutoria."

<sup>1</sup> See for a short explanation of the nature of a *formula praedjudicialis*, Sanders' *Justinian*, Introduction, p. 66, and notes on IV. 6. 13.

<sup>2</sup> The subject of *dos* is discussed in Ulp. VI. See also Mackenzie's

*Roman Law*, p. 103.

<sup>3</sup> The reading: "item adjudicatio vel condemnatio sine demonstratione vel intentione nullas vires habet," is Göschen's. Heffter leaves standing in his edition the corrupt form "item condemnatio sine demonstratione vel intentione vel adjudicatione nullas vires habet," but admits in a note that no sense can be got out of it.

<sup>4</sup> IV. 37.

<sup>5</sup> That is, the question at issue is



### *Formulae in Factum conceptae.*

conceptas vocamus, id est in quibus nulla talis intentionis *conceptio* est, *sed* initio formulae, nominato eo quod factum est, adiciuntur ea verba per quae iudici damnandi absolvendive potestas datur. qualis est formula qua utitur patronus contra libertum qui eum contra edictum Praetoris in ius vocat; nam in ea ita est: RECUPERATORES SUNTO. SI PARET ILLUM PATRONUM AB ILLO LIBERTO CONTRA EDICTUM ILLIUS PRAETORIS IN IUS VOCATUM ESSE, RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE. SI NON PARET, ABSOLVITE ceterae quoque formulae quae sub titulo *de in ius vocando* propositae sunt in factum conceptae sunt: velut adversus eum qui in ius vocatus neque venerit neque vindicem dederit; item contra eum qui *vi* exemerit eum qui in ius vo-

*factum conceptae*; formulae, that is to say, in which the *intentio* is not drawn up in the manner above, but at the outset of which, after a specification of that which has been done, words are added whereby power is conferred on the *iudex* of condemning or acquitting. Of this kind is the formula which the patron employs against his freedman who summons him into court contrary to the Praetor's edict, for it runs: "Let there be *recuperatores*<sup>1</sup>. Should it appear that such and such a patron has been summoned into court by such and such a freedman contrary to the edict of such and such a Praetor, then let the *recuperatores* condemn the said freedman to pay to the said patron 10,000 sesterces<sup>2</sup>; should it not appear so, let them acquit him." The other formulae which are set forth under the title *de in ius vocando*<sup>3</sup> are *conceptae in factum*: as for instance against him who when summoned into court has neither made his appearance nor assigned a deputy<sup>4</sup>; also against him

what is the law applicable to a certain set of facts admitted by both parties.

An example of a *formula in ius concepta* is to be found in Cic. *pro Rosc. Com.* c. 4.

<sup>1</sup> If we adopt Beaufort's conjecture, *recuperator* was the name applied to a person appointed by the Praetor to investigate a case, when such person did not sit alone but in company with two or four others.

Beaufort's *Rep. Rom.* v. 2. See notes on I. 20, IV. 105.

<sup>2</sup> See Just. *Inst.* IV. 16. 3; D. 2. 4. 24 and 25. From these passages we also perceive that the copyist of the MS. has by a mistake written 10,000 for 5000 sesterces in the *condemnatio* of the formula quoted in the text.

<sup>3</sup> These are commented on in D. 2. 4.

<sup>4</sup> See note on IV. 21. Whether

### *Formulae in factum et in jus.*

catur. et denique innumerabiles eiusmodi aliae formulae in albo proponuntur. (47.) Sed ex quibusdam causis Praetor et in ius et in factum conceptas formulas proponit, velut depositi et commodati. illa enim formula quae ita concepta est: IUDEx ESTO. QUOD AULUS AGERIUS APUD NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET EX FIDE BONA, EIUS IUDEx NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO, NISI RESTITUAT. SI NON PARET, ABSOLVITO—in ius concepta est. at illa formula quae ita concepta est: IUDEx ESTO. SI PARET AULUM AGERIUM APUD NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE EAMQUE DOLO MALO NUMERII NEGIDII AULO AGERIO REDDITAM NON

who has by force prevented a person summoned into court from making his appearance. In fact there are innumerable other formulae of a like description set forth in the edict. 47. There are, however, cases in which the Praetor publishes both *formulae in ius conceptae* and *formulae in factum conceptae*, for instance, in the actions on deposit and on loan<sup>1</sup>; for the formula which is drawn up in this form: "Let there be a *judex*. Inasmuch as Aulus Agerius has deposited a silver table with Numerius Negidius, from which transaction this suit arises, whatever Numerius Negidius ought in good faith to give or do to Aulus Agerius on account of this matter, do thou, *judex*, condemn Numerius Negidius to give or do to Aulus Agerius, unless he restore (the table)<sup>2</sup>," is a *formula in ius concepta*: but that which is drawn up thus: "Let there be a *judex*: should it appear that Aulus Agerius has deposited with Numerius Negidius a silver table, and that this through the fraud of Numerius Negidius has not been restored, do thou, *judex*, condemn Numerius Negidius to pay to Aulus Agerius as much

the *iudex* was in Gaius' time required in all cases where neither the summons was obeyed nor bail tendered, or was only needed in centumviral causes and actions *depensi* and *judicati*, is a disputed point. Hefsteri annot. ad loc.

<sup>1</sup> IV. 60. See note (I) in Appendix.

<sup>2</sup> In the MS. after the word *condemnato* appear the letters n. r., which Hefster thinks are incapable of any satisfactory explanation. It is Huschke's suggestion that they stand for *nisi restituat*, as inserted in our text. For this kind of formula see D. 16. 3. 1. 21 and D. 13. 6. 3. 3.

ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO. SI NON PARET, ABSOLVITO—in factum concepta est. similes etiam commodati formulae sunt.

48. Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio concepta est. itaque etsi corpus aliquod petamus, *velut fundum, hominem, vestem, aurum, argentum*, iudex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat, *sed* aestimata re pecuniam eum condemnat. (49.) Condemnatio autem vel certae pecuniae in formula ponitur, vel incertae. (50.) certae pecuniae in ea formula qua certam *pecuniam petimus*; nam illic ima parte formulae ita est: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA CONDEMNATA. SI NON PARET, ABSOLVE. (51.) incertae vero condemnatio pecuniae duplicem significationem habet. est enim una *cum* aliqua praefinitione, quae vulgo dicitur cum taxatione, velut si incertum aliquid petamus; nam

money as the thing in dispute shall be worth: should it not so appear, acquit him," is a *formula in factum concepta*. There are similar formulae for loan also.

48. The *condemnatio* of all the formulae which have one is drawn with a view to pecuniary compensation; therefore, although we be suing for some specific article, as for instance, for a field, a slave, a garment, gold, silver, the *iudex* does not condemn the defendant (to restore) the thing itself, as was the custom in old times, but condemns him to pay money according to the valuation of the thing. 49. The *condemnatio* is drawn in the formula for a sum certain or for a sum uncertain. 50. It is for a sum certain in the formula by which we sue for a sum certain, for at the end of the formula there occurs the direction: "Do thou, *iudex*, condemn Numerius Negidius to pay to Aulus Agerius 10,000 sesterces: should it not so appear, acquit him." 51. The *condemnatio* may be for a sum uncertain in two different senses. For there is one kind with a definite maximum prefixed, which is generally styled *cum taxatione*<sup>1</sup>; for instance, when we are suing for something

<sup>1</sup> So called because the word *dumtaxat* occurs in it, as in the instance given and that in IV. 43. Festus gives another explanation, con-

necting *taxat* and *taxatio* with See Festus, *sub verb.* If we regard *dumtaxat* as two words, we might accept Festus' definition, translating

illic *ima parte formulae* ita est: EIUS IUDEx NUMERIUM 1  
DIUM AULO AGERIO DUMTAXAT X MILIA CONDEMNA. SI NON  
PARET, ABSOLVE. *diversa est quae infinita est, velut si rem ali-*  
*quam a possidente nostram esse petamus, id est si in rem*  
*agamus, vel ad exhibendum; nam illic ita est: QUANTI EA RES*  
*ERIT TANTAM PECUNIAM IUDEx NUMERIUM NEGIDIUM AULO*  
*AGERIO CONDEMNA. SI NON PARET, ABSOLVITO.* (52.) Qui de  
re vero est iudex si condemnat, certam *pecuniam* condemnare  
debet, etsi certa pecunia in condemnatione posita non sit.  
debet autem iudex attendere, *ut cum certae pecuniae condem-*  
*natio posita sit, neque maioris neque minoris summa petita*  
*condemnet, alioquin litem suam facit. item si taxatio posita sit,*

uncertain, for then in the final part of the formula the wording  
is: "on this account, *iudex*, condemn Numerius Negidius to  
pay to Aulus Agerius a sum not exceeding 10,000 sesterces;  
should it not so appear, acquit him." The other kind is that  
which is unlimited; for instance, when we are claiming any-  
thing as being ours from one who is in possession thereof, that  
is when our action is one *in rem*, or for the purpose of having  
the thing produced in court, for then the *condemnatio* runs;  
"Do thou, *iudex*, condemn Numerius Negidius to pay to Aulus  
Agerius as much money as the thing in dispute is worth: if it do  
not so appear, acquit him." 52. But if he who is *iudex* in a case  
condemn, he must condemn in a specific amount, even though  
no specific amount have been stated in the *condemnatio*. A  
*iudex* must on the other hand take care, when the *condemnatio*  
is limited to a sum specified, not to condemn for a larger or  
smaller amount than that sued for, otherwise "he makes the  
cause his own<sup>1</sup>." So also where a *taxatio* has been added,

*dum taxat*, "so long as he touches,"  
i. e. "goes as far as, does not ex-  
ceed."

<sup>1</sup> "A *iudex* is said 'to make the  
cause his own' when his decision is  
fraudulently and designedly given to  
evade the provisions of a *lex*. He  
will be guilty of fraud, if he be prov-  
ed to have acted from favour, or en-  
mity, or mercenary motives; and  
will have to pay the full value of the  
matter in dispute." D. 5. 1. 15. 1.

The phrase is found in Cic. *de Orat.*  
II. 75, "Quid si, quum pro altero  
dicas, litem suam facias." From the  
passage in the text it would appear  
that a *iudex* was liable for a wrong  
decision given through ignorance, as  
well as for one through fraud; but  
it is to be remembered that skill-  
ed *jurisconsults* were appointed to  
assist the *judices*; see Aul.  
XII. 13. Note (L) in Appendix.

ne pluris condemnet quam taxatum sit, alias enim similiter litem suam facit. minoris autem damnare ei permissum est [*desunt 7 fere lin.*].

53. Si quis intentione plus complexus fuerit, causa cadit, id est rem perdit, nec a Praetore in integrum restituitur, praeterquam quibusdam casibus in quibus [actori succurritur propter aetatem, vel si tam magna causa iusti erroris intervenerit, ut etiam constantissimus quisque labi posset. plus autem quatuor modis petitur: re, tempore, loco, causa. re: veluti si quis pro x milibus quae ei debebantur, xx milia petierit, aut si is cuius ex

he must not condemn for more than the sum "taxed," for otherwise he will, as before, "make the cause his own:" he may, however, condemn for less. . . .

53. Where a person has comprised in his *intentio* more (than is due to him), he fails in his cause, i.e. he loses the thing he is suing for, and he cannot be restored to his former position<sup>1</sup> by the Praetor, except in certain cases in which [the<sup>2</sup> plaintiff is assisted owing to want of age, or where there appears some reason for the mistake so great that even the most wary person might have been misled. 'Too much is sued for in four ways, *re*, *tempore*, *loco*, and *causa*<sup>3</sup>. It is sued for *re*, as in the case of a man seeking to recover 20,000 sesterces instead of the 10,000 owed to him, or in the case of a man who having a share in a particular thing lays his *intentio* for the whole or too large a part of it. It is sued for *tempore*, as in the case of a man suing before the arrival of the day named or the happening

<sup>1</sup> Here *restitui in integrum*=to have the right of bringing a new action on the old facts. As soon as a litigated matter had arrived at the *litis contestatio* a *novatio* took place, and the defendant was no longer under obligation to fulfil his original engagement, but bound to carry out the award of the court: if then the court acquitted him, the plaintiff obviously could no longer sue on the original obligation, as that had been extinguished by the *novatio*. Hence *in integrum* signifies that the plaintiff is freed from the unpleasant effects of the *novatio*, or in other words, can bring a new action on the original case. See III. 180, 181. Paulus, S. R. 1. 7.

<sup>2</sup> The remainder of this section is translated from the conjectural reading of Heffter, printed in the text above.

<sup>3</sup> "Causa cadimus aut loco, aut summa, aut tempore, aut qualitate. Loco, alibi; summa, plus: tempore, repetendo ante tempus: qualitate ejusdem speciei rem meliorem postulantes." Pauli, S. R. 1. 10. See also Just. Inst. IV. 6. 33, where the alterations effected by Zeno's constitution are specified, with the exception of that in respect of a *plus petitio tempore*, which was that a plaintiff should have to wait twice as long as he originally would have had to wait, and pay all costs." C. 3. 10. 1.

parte res est, totam rem, *vel maiore ex parte suam esse intendit. tempore: veluti si quis ante diem vel conditionem petierit. loco plus petitur: veluti cum quis id quod certo loco dari promissum erat, alio loco petit, sine commemoratione eius loci. verbi gratia si in stipulatione ita erat: X MILIA CAPUAE DARE SPONDES? DARE SPONDEO, deinde detracta loci mentione x milia Romae pure intenderit: SI PARET NUMERIUM NEGIDIUM AULO AGERIO X MILIA SS. DARE OPORTERE.* plus repetere enim intelligitur, quia promissori pura intentione utilitatem adimit, quam haberet, si Capuae solveret. Si quis tamen eo loco agat, quo dari promissum est, *potest petere id etiam non adiecto loco*]. (53a.) Causa plus petitur, velut si quis in intentione tollat electionem debitoris quam is habet obligationis iure. velut si quis ita stipulatus sit: SESTERTIUM X MILIA AUT HOMINEM STICHUM DARE SPONDES? deinde alterutrum ex his petat; nam quamvis petat quod minus est, plus tamen petere videtur, quia potest adversarius interdum facilius id praestare quod non petitur. similiter of the condition fixed. It is sued for *loco*, as in the case of a man suing in some other place for the money which it had been promised should be paid in a particular place, without referring to the place so specified: for instance, suppose the stipulation had been in this form; "Do you engage to give me 10,000 sesterces at Capua?" "I do so engage;" and then the plaintiff, omitting all mention of the place fixed on, were to lay his *intentio* at Rome in the general form, thus: "Should it appear that Numerius Negidius is bound to give to Aulus Agerius 10,000 sesterces." For the plaintiff is assumed to be suing for too large an amount, because by this ordinary *intentio* he deprives the promiser of the advantage he might have had by the payment being made at Capua. If, however, the plaintiff bring his action in the place where it was promised that the money should be given he can sue for it even without adding the name of the place.] (53a.) It is sued for *causa*, as in the case where a creditor in his *intentio* deprives his debtor of that right of election which he has by virtue of the obligation between them; as when a stipulation is worded thus: "Do you promise to give 10,000 sesterces or your slave Stichus?" and thereupon the creditor claims one or the other of these: now here although he may actually sue for that of smaller value, yet he is regarded as suing for the larger, for it might be that his opponent could more easily give that which

si quis genus stipulatus sit, deinde speciem petat. velut si quis *purpuram* stipulatus sit generaliter, deinde Tyriam specialiter petat: quin etiam licet vilissimam petat, idem iuris est propter eam rationem quam proxime diximus. idem iuris est si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat, velut Stichum, quamvis vilissimum. itaque sicut ipsa stipulatio concepta est, ita et intentio formulae concipi debet. (54.) Illud satis apparet in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed quidquid adversarium dare facere oporteret intendatur, nemo potest plus intendere. idem iuris est, et si in rem incertae partis actio data sit; velut si heres QUANTAM PARTEM petat IN EO FUNDO, QUO DE AGITUR, PAREAT IPSIUS ESSE: quod genus actionis in paucissimis causis dari solet. (55.) Item palam est, si quis aliud pro alio intenderit, nihil eum periclitari eumque ex integro agere

is not demanded. Similarly when a person having stipulated for a *genus*, sues for a *species*; as when the stipulation has been for purple cloth generally, and the action is specifically for Tyrian cloth: now here although he may be suing for that which is of least value, yet for the reason we have just stated, the rule is the same. So too is it when the stipulation has been for a slave generally, and the suit is brought for a particular slave, viz. Stichus, although he be really of the least value. Hence as the stipulation has been worded, so ought the *intentio* of the formula to be drawn. 54. Of this there is no doubt, that in what are called *incertae formulae*<sup>1</sup> too large an amount cannot be sued for, because when a definite amount is not sued for, but the *intentio* is laid for "whatever our opponent ought to give or do," no one can be guilty of a *plus petitio*. The same rule also holds when an action *in rem* has been granted for an undetermined part; for instance, if the heir sue for "such part in the land about which the action is, as shall appear to belong to him"; a kind of action which is allowed in very few instances. 55. Again, it is clear that when a man lays his *intentio* (by mistake) for one thing instead of another, he is not put in peril thereby, and can sue again,

<sup>1</sup> IV. 49--53.

<sup>2</sup> We have translated Huschke's reading: Heffter's is "velut potest

heres, quantam partem petat in eo fundo quo de agitur nescius esse."



posse, quia *nihil in iudicium deducitur, velut si is qui hominem Stichum petere deberet, Erotem petierit*; aut si quis ex testamento dare sibi oportere intenderit, cui ex stipulatu debebatur; aut si cognitor aut procurator intenderit sibi dare oportere. (56.) *Sed plus quidem intendere, sicut supra diximus, periculosum est: minus autem intendere licet; sed de reliquo intra eiusdem praeturam agere non permittitur. nam qui ita agit per exceptionem excluditur, quae exceptio appellatur litis dividuae.* (57.) *At si in condemnatione plus petitum sit quam oportet, actoris quidem periculum nullum est, sed si iniquam formulam acceperit, in integrum restituitur, ut minuatur condemnatio. si vero minus positum fuerit quam oportet, hoc solum con-*

because nothing is really laid before the *iudex*; for instance, when a man who ought to sue for the slave Stichus sues for Eros; or when a man to whom a matter is due upon a stipulation sets forth in his *intentio* that it is due to him upon a testament; or when a *cognitor*<sup>1</sup> or *procurator* has worded his *intentio* that something is due to himself (instead of to his principal). 56. But although, as we have said above<sup>2</sup>, it is dangerous to lay an *intentio* for too much, we may lay one for too little: but then we may not sue for the residue within the term of office of the same Praetor. For if we so sue, we are met successfully by the *exceptio* styled *litis dividuae*<sup>3</sup>. 57. Where, however, too much is comprised in the *condemnatio* the plaintiff is in no peril: but if he have received<sup>4</sup> an improperly-drawn formula the proceedings are quashed<sup>5</sup> in order that the *condemnatio* may be lessened. But if too small an amount be stated, the plaintiff only

<sup>1</sup> IV. 83, 84.

<sup>2</sup> IV. 53.

<sup>3</sup> IV. 122. By Zeno's constitution, referred to in note on IV. 53, the *iudex* was allowed in such a case to augment the amount in giving his decision.

<sup>4</sup> Sc. from the Praetor.

<sup>5</sup> See note on IV. 53. In a recently published translation this sentence is rendered thus: "the plaintiff does not run any risk, for if the defendant (!) has accepted an unfair formula, he may avail himself of the *in integrum restitutio* to lessen the *condemnatio*;" but why

the Latin should be thus twisted into nonsense, it is hard to see. The nominative to *acceperit* must be *actor*, implied from the *actoris* just preceding, and the sense is then quite plain, "the plaintiff is not to be treated as if he had made a *plus petitio*, but to have a new formula granted to him;" possibly because an error in the *condemnatio* must be due to carelessness on the part of the magistrate who issued the formula, and not produced by a misstatement made by the plaintiff himself, as is a *plus petitio* in the *intentio*.

### *Plus Petitio in the Demonstratio.*

sequitur quod posuit : nam tota *quidem* res in iudicium deducitur, constringitur autem condemnationis fine, quam iudex egredi non potest. nec ex ea parte Praetor in integrum restituit : facilius enim reis Praetor succurrit quam actoribus. loquimur autem exceptis minoribus xxv annorum ; nam huius aetatis hominibus in omnibus rebus lapsis Praetor succurrit. (58.) Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet : et hoc est quod dicitur falsa demonstratione rem non perimi. (59.) sed sunt qui putant minus recte *comprehendi*. nam qui forte Stichum et Erotem emerit, recte videtur ita demonstrare : QUOD EGO DE TE HOMINEM EROTEM EMI, et si velit, de Sticho alia formula idem agat, quia verum est cum qui duos emerit singulos *quoque* emisse : idque ita *maxime* Labeoni visum est. sed si is qui unum emerit de duobus egerit, falsum demonstrat. idem et in aliis actionibus

obtains what he has so stated : for the whole matter, having been laid before the *iudex*, is strictly confined to the limits of the *condemnatio*, beyond which the *iudex* must not go<sup>1</sup>. Nor does the Praetor in this instance allow a fresh action : for he is more ready to assist defendants than plaintiffs. But from these remarks we except those who are under 25 years of age : for the Praetor in all cases of mistake on the part of such persons readily grants them relief<sup>2</sup>. 58. If in the *demonstratio* a larger or smaller sum than that due be placed, there is nothing for the *iudex* to try, and the matter remains as it was at starting : and this is what is meant by the saying, "that the matter in dispute is not brought to a conclusion by a false *demonstratio*." 59. Some lawyers, however, think that it is not bad pleading to state too small an amount in the *demonstratio*. For, to take an instance, a person who has bought Stichus and Eros is entitled to draw his *demonstratio* thus : "Inasmuch as I bought the slave Eros of you," and if he please may claim Stichus in like manner by another formula, because it is true enough that the purchaser of two slaves is also the purchaser of one of them : and this certainly was Labeo's opinion<sup>3</sup>. On the other hand, when the purchaser of one thing sues for two, his *demonstratio* is false. This doctrine holds in other actions also, such as those of

<sup>1</sup> IV. 52.  
<sup>2</sup> II. 163.

<sup>3</sup> D. 16. 3. 1. 41 is perhaps the passage referred to.

est, velut commodati, depositi. (60.) Sed nos apud quosdam scriptum invenimus, in actione depositi et denique in ceteris omnibus quibus damnatus unusquisque ignominia notatur, eum qui plus quam oporteret demonstraverit litem perdere. velut si quis una re deposita duas res deposuisse demonstraverit, aut si is cui pugno mala percussa est in actione iniuriarum esse aliam partem corporis percussam sibi demonstraverit. quod an debeamus credere verius esse, diligentius requiremus. certe cum duæ sint depositi formulae, alia in ius concepta, alia in factum, sicut supra quoque notavimus, et in ea quidem formula quae in ius concepta est, initio res de qua agitur demonstratur, tum designetur, deinde inferatur iuris contentio his verbis: QUIDQUID OB EAM REM ILLUM MIHI DARE FACERE OPORTET; in ea vero quae

*modatum* and *depositum*<sup>1</sup>. 60. We have, however, found it stated by some writers, that in the action on *depositum* and in all other actions where the consequence is ignominy<sup>2</sup> to one who suffers an adverse verdict, he who has claimed too much in his *demonstratio* loses the suit. As when a man after making a deposit of one thing has claimed two, or when after being struck on the cheek with a blow of the fist, he has stated in the *demonstratio* of his action for injuries that some other part of his body was struck. We will examine this statement a little more at length to see whether we ought to consider it correct. No doubt, since there are, as we have stated above<sup>3</sup>, two formulae for an action of deposit, one *in ius concepta*, the other *in factum concepta*, and in the former the matter in dispute is first inserted in the *demonstratio*, then particulars are given, and, lastly, the issue of law is introduced in these words: "Whatever the defendant is bound on that account to give or do for me:" whilst in the formula *in factum concepta* the thing in dispute is described in the *intentio* itself without any *demonstratio*<sup>4</sup>, in this form: "Should it appear that he deposited such and such a thing with

<sup>1</sup> See note (I) in Appendix.

<sup>2</sup> A list of the actions which carried this consequence with them is to be found in IV. 182. What was the exact effect of an ignominious verdict is not, however, very clear: but that it did seriously affect the person against whom it was recorded seems obvious from

the careful enumeration of the various causes producing *ignominia* or *infamia* to be found in D. 3. 2.

<sup>3</sup> IV. 47.

<sup>4</sup> The reading is Heffter's: Gneist has "statim initio intentionis loco" instead of "sine demonstratione in ipsa intentione."

in factum concepta est sine demonstratione ipsa intentione res de qua agitur designetur his verbis: SI PARET ILLUM APUD ILLUM REM ILLAM DEPOSUISSE: dubitare non debemus, quin si quis in formula quae in factum composita est plures res designaverit quam deposuerit, *litem* perdat, quia in intentione plus po—  
[desunt 48 lin.].

61. In bonae fidei iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi quantum actori restitui debeat. In quo et illud continetur, ut habita ratione eius quod invicem actorem ex eadem causa praestare oporteret, in reliquum eum cum quo actum est condemnare debeat. (62.) Sunt autem bonae fidei iudicia haec: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, commodati. (63.) Tamen iudici — — — compensationis rationem habere non ipsius formulae verbis praecipitur; sed quia id bonae fidei iudicio conveniens videtur, ideo officio eius con-

the defendant:" (all this being true) there can be no doubt that if in a formula *in factum concepta* the plaintiff has described more things than he has deposited, he loses his suit, because he has claimed too much in the *intentio*<sup>1</sup>...

61. In actions *bonae fidei*<sup>2</sup> full power is allowed to the *iudex* to assess according to principles of fairness and equity the amount which ought to be paid to the plaintiff. In this commission is also contained the duty of taking account of anything which the plaintiff in his turn is bound to pay upon the same transaction, and so condemning the defendant to pay the balance only<sup>3</sup>. 62. Now the *bonae fidei* actions are these: actions arising on sale, letting, voluntary agency<sup>4</sup>, mandate, deposit, fiduciary agreement to restore<sup>5</sup>, partnership, guardianship, loan. 63. The *iudex*, however, is not enjoined in the actual words of the formula to take account of set-off: but it is considered to be within the scope of his office, because it seems

<sup>1</sup> Heffter and Huschke are both of opinion that the matter here missing was similar to that contained in Just. Inst. IV. 6. 36-39.

<sup>2</sup> The distinction between actions *stricti iuris* and *bonae fidei* is treated of in Just. Inst. IV. 6. 28-30. As the whole subject is fully discussed

and explained in Sandars' notes on those sections, we need only refer thereto.

<sup>3</sup> See Paulus, S. R. II. 5. 3 and D. 13. 6. 18. 4.

<sup>4</sup> See Lord Mackenzie's *Lane*, p. 237; D. 44. 7. 5. pr.

<sup>5</sup> II. 59, 60.

tineri creditur. (64.) Alia causa est illius actionis qua argentarius experitur : nam is cogitur cum compensatione agere, *id est ut* compensatio verbis formulae comprehendatur. *itaque* argentarius ab initio compensatione facta minus intendit sibi dare oportere. ecce enim si *sestertium* x milia debeat Titio, atque ei xx debeat *Titius*, *ita* intendit : si paret Titium sibi x milia dare oportere amplius quam ipse Titio debet. (65.) Item—bonorum emptor cum deductione agere *debet*, *id est ut* in hoc solum adversarius condemnatur quod superest, deducto eo quod invicem ei defraudatoris nomine debetur. (66.) Inter compensationem autem quae argentario interponitur, et deductionem quae obicitur *bonorum emptori*, illa differentia est, quod in compensationem hoc solum vocatur quod eiusdem generis et naturae est. veluti pecunia cum pecunia compensatur, triticum cum

consonant with the notion of a *bonae fidei* action. 64. The case is different in the kind of action by which a banker sues ; for he is compelled to sue *cum compensatione*, i.e. the set-off must be comprised within the wording of the formula. Therefore, making the set-off at the outset, the banker declares in his *intentio* that the reduced sum is due to him. Thus, suppose he owes Titius 10,000 sesterces and Titius owes him 20,000, his *intentio* is thus laid by him : "Should it appear that Titius is bound to give him 10,000 sesterces more than he owes to Titius." 65. Again a *bonorum emptor*<sup>1</sup> ought to bring his action *cum deductione*, that is to say, for his opponent to be condemned to pay the balance only after the sum has been deducted which is reciprocally due to him on the part of the bankrupt<sup>2</sup>. 66. Between the set-off declared against a banker and the deduction opposed to a *bonorum emptor* there is this difference, that in the set-off nothing is taken into account except what is of the same class and character : as, for instance, money is set off

<sup>1</sup> III. 77.

<sup>2</sup> As to the meaning of this passage there has been much discussion ; the *ei* which we have taken into our text instead of *sibi* (before *defraudatoris*) is a suggestion of Huschke. The meaning will then in our opinion be, that where the

same man is at once a debtor and creditor of the bankrupt estate, he must not be compelled to pay what he owes in full, and receive for that due to him only a dividend, but that set-off must first be made and then a dividend be paid to him on the balance due.

tritico, vinum cum vino : adeo ut quibusdam placeat non omni modo vinum cum vino, aut triticum cum tritico compensandum, sed ita si eiusdem naturae qualitatisque sit. in deductionem autem vocatur et quod non est eiusdem generis. itaque si *a Titio* pecuniam petat bonorum emptor, et invicem frumentum aut vinum *Titio* debeat, deducto quanti id erit, in reliquum *ex- peritur*. (67.) Item vocatur in deductionem et id quod in diem debetur; compensatur autem hoc solum quod praesenti die debetur. (68.) Praeterea compensationis quidem ratio in intentione ponitur : quo fit, ut si facta compensatione plus nummo uno intendat argentarius, causa cadat et ob id rem perdat. deductio vero ad condemnationem ponitur, quo loco plus petenti periculum non intervenit; utique bonorum *emptore* agente, qui licet de certa pecunia agat, incerti tamen condemnationem concipit.

69. Quia tamen superius mentionem habuimus de actione

against money, wheat against wheat, wine against wine; nay, some persons think that wine cannot in all cases be set off against wine, nor wheat against wheat, but only when the two parcels are of like character and quality. But in the case of a deduction things are taken into account which are not of the same class'. Hence if the *bonorum emptor* sue Titius for money and himself in turn owe<sup>2</sup> corn or wine to Titius, after deduction of the value thereof, he claims for the balance. 67. In a deduction account is also taken of that which is due at a future time; but in a set-off only of that due at the instant. 68. Moreover the reckoning of a set-off is stated in the *intentio*; the result of which is that if the banker on making his set-off claim too much by a single sesterce, he fails in his cause, and so loses the whole matter at issue. But a deduction is placed in the *condemnatio*; and there is no danger to a man who makes a *plus petitio* there<sup>3</sup>: at least when the plaintiff is a *bonorum emptor*, for although such an one sues for a specified sum, yet he frames his *condemnatio* for an uncertain one.

69. As we have already<sup>4</sup> mentioned the action which may be

<sup>1</sup> See Paulus, *S. R.* II. §. 3.

<sup>2</sup> Owe, *i. e.* on account of the bankrupt estate, not of course on his own account: in the latter case no *deductio* would be allowed. See

*D.* 13. 6. 18. 4. Paulus, *S. R.* II.

<sup>3</sup> 12 gives a like rule as to *depositum*.

<sup>4</sup> IV. 57.

<sup>4</sup> Probably in the part of the MS. which immediately precedes

qua in peculium filiorumfamilias servorumque agatur, opus est, ut de hac actione et de ceteris quae eorumdem nomine in parentes dominosve dari solent diligentius admoneamus.

70. Inprimis itaque si iussu patris dominive negotium gestum erit, in solidum Praetor actionem in patrem dominumve comparavit: et recte, quia qui ita negotium gerit magis patris dominive quam filii servive fidem sequitur. (71.) Eadem ratione comparavit duas alias actiones, exercitoriam & institoriam. tunc autem exercitoria locum habet, cum pater dominusve filium servumve magistrum navis praeposuerit, et quod cum eo eius rei gratia cui praepositus fuit negotium gestum erit. cum enim ea quoque res ex voluntate patris dominive contrahi videatur, aequissimum *Praetori* visum est in solidum actionem dari. quin etiam, licet extraneum quis *quemcumque magistrum navi praeposuerit*, sive servum sive liberum, tamen ea Praetoria actio in

brought for the *peculium* of children under *potestas* and of slaves, it is now necessary for us to explain more carefully the nature of this action, and of others which are usually granted against parents or masters in the name of such persons.

70. In the first place, then, if any undertaking have been entered into by the express command of the father or master, the Praetor has provided a form of action for the whole debt against such father or master; and this is very proper, because he who enters into such an engagement puts his confidence in the father or master rather than in the son or slave. 71. On the same principle the Praetor has drawn up two other actions, known respectively as *exercitoria* and *institoria*. The former of these is resorted to when a father or master has made his son or slave the captain of a vessel, and some engagement has been entered into with one or the other with reference to the business he was appointed to manage. For as the engagement is contracted with the consent of the father or master, it seemed to the Praetor most equitable that there should be a means of recovering the full amount. And, what is more, although the owner of the vessel have placed some stranger, whether bond or free, in command, still this Praetorian action is granted

IV. 61; for this, as we stated in a note thereon, corresponds to *Inst.* IV. 6. 36—39, and in that part of Justinian's work the *peculium* and the actions relating to it are referred to.



## *Tributorian Action.*

eum redditur. ideo autem exercitoria actio appellatur, quia exercitor vocatur is ad quem cottidianus navis quaestus pervenit. Institoria *vero* formula tum locum habet, cum quis tabernae aut cuilibet negotiationi filium servumve *aut etiam* quemlibet extraneum, sive servum sive liberum, praeposuerit, et quid cum eo eius rei gratia cui praepositus est contractum fuerit. ideo autem institoria *appellatur*, quia qui tabernae praepositur institor appellatur. quae *et ipsa* formula in solidum est.

72. Praeterea tributoria *quoque* actio in patrem dominumve pro filiis filiabusve, servis ancillabusve constituta est, cum filius servusve *in peculiari merce sciente patre dominove negotiatur*. nam si quid cum eo eius rei causa contractum erit, ita Praetor ius dicit, ut quidquid in his mercibus erit, quodque inde receptum erit,

against him (the owner). The reason why the action is called *exercitoria* is because the name *exercitor*<sup>1</sup> is given to the person to whom the daily profits of a vessel accrue. The *formula institoria* lies, whenever a person has placed his son, or slave, or even a stranger, whether bond or free, to manage a shop or business of any kind, and some engagement has been entered into with this manager<sup>2</sup> in reference to the business he has been set to manage. It derives its name *institoria* from the fact that the person who is set to manage a shop is called *institor*. This formula, too, is for the full amount.

72. Besides these actions, another, called the *actio tributoria*, has been granted (by the Praetor's edict) against a father or master on account of his sons and daughters, or male and female slaves<sup>3</sup>, when such child or slave trades with the merchandise of his *peculium* with the knowledge of his father or master. For if any contract have been entered into with such trader on account of such business, the rule ordained by the Praetor is, that all the stock comprised in the *peculium* and all profit aris-

<sup>1</sup> An *exercitor* was not necessarily the owner of a vessel, but might be a charterer. See D. 14. 1. 1. 15.

<sup>2</sup> Or with the servants or apprentices of the manager. See Paulus, S. R. 11. 8. 3: "Quod cum discipulis eorum qui officinis vel tabernis praesunt contractum est, in magistrum vel institores tabernae in actio dabitur." See D. 14.

3. 3. and 14. 3. 8.

<sup>3</sup> So Hefster reads: Huschke has "de eorum mercibus rebusve" instead of "pro filiis filiabusve, servis ancillabusve."

The following paragraphs are supplied from Just. *Inst.* IV. 7. 3 and 4, a page being lost at this point from the MS.

*id inter patrem dominumve, si quid ei debetur, et ceteros creditores pro rata portione distribuatur. et quia ipsi patri dominove distributionem permittit, si quis ex creditoribus queratur, quasi minus ei tributum sit quam oportuerit, hanc ei actionem adcommodat, quae tributoria appellatur.*

73. *Practerea introducta est actio de peculio deque eo quod in rem patris dominive versum erit, ut quamvis sine voluntate patris dominive negotium gestum erit, tamen sive quid in rem eius versum fuerit, id totum praestare debeat, sive quid non sit in rem eius versum, id eatenus praestare debeat, quatenus peculium patitur. In rem autem patris dominive versum intelligitur quidquid necessario in rem eius impenderit filius servusve, veluti si mutuatus pecuniam creditoribus eius solverit, aut aedificia ruentia fulserit, aut familiae frumentum emerit, vel etiam fundum aut quamlibet aliam rem necessariam mercatus erit. itaque si ex decem ut puta sestertiis quae servus tuus a Titio mutua accepit creditori tuo quin-*

ing therefrom, shall be divided between the father or master, if anything be due to him, and the other creditors, in proportion to their claims. And as the Praetor allows the father or master to make the distribution, therefore in case of complaint being made by any one of the creditors that his share is smaller than it ought to be, he gives this creditor the action called *tributoria*.

73. In addition to the above, an action has been introduced "relating to the *peculium* and to whatever has been spent on the business of the father or master;" so that even though the transaction in question have been entered into without the wish of the father or master, yet if, on the one hand, anything have been applied to his profit, he is bound to make satisfaction to the full amount of that profit, and if, on the other hand, there have been no profit to him, he is still bound to make satisfaction so far as the *peculium* admits. Now everything which the son or slave necessarily expends upon the father's or master's business is taken to be to the profit of the father or master, as for example, when the son or slave has borrowed money and with it paid his father's or master's creditors, or propped up his ruinous buildings, or purchased corn for his household, or bought an estate or anything else that was wanted. Therefore if out of ten sestertia, for instance, which your slave has borrowed from Titius, he have paid five to a cre-

*que sestertia solverit, reliqua vero quinque quolibet modo consumpserit, pro quinque quidem in solidum damnari debes, pro ceteris vero quinque eatenus, quatenus in peculio sit: ex quo scilicet apparet, si tota decem sestertia in rem tuam versa fuerint, tota decem sestertia Titium consequi posse. licet enim una est actio qua de peculio deque eo quod in rem patris dominive versum sit agitur, tamen duas habet condemnationes. itaque iudex apud quem ea actione agitur ante dispicere solet, an in rem patris dominive versum sit, nec aliter ad peculii aestimationem transit, quam si aut nihil in rem patris dominive versum intelligatur, aut non totum. Cum autem quaeritur quantum in peculio sit, ante deducitur quod patri dominove quique in potestate eius sit a filio servove debetur, et quod superest, hoc solum peculium esse intelligitur. aliquando tamen id quod ei debet filius servusve qui in potestate patris dominive est non deducitur ex peculio, velut si is cui debet in huius ipsius peculio sit.*

ditor of yours, and spent the other five in some way or other, you ought to be condemned to make good the whole of the first five, but as to the other five only so far as the *peculium* goes. Hence it appears that if the whole of the ten sestertia have been spent upon your business, Titius is entitled to recover them all. For although there is but one and the same form of action for obtaining the *peculium* and the amount spent on the business of the father or master, yet it has two *condemnationes*. Therefore the *iudex* before whom the action is tried ought first to ascertain whether anything has been spent on the business of the father or master, and he can only go on to settle the amount of the *peculium* after satisfying himself that nothing, or not the whole amount in question, has been spent on the father's or master's business. When, however, the question arises about the amount of the *peculium*, anything which is owed by the son or slave to the father or master or to a person in his *potestas* is first deducted, and the balance alone is reckoned as *peculium*. Still, sometimes, what a son or slave owes to a person in the *potestas* of his father or master is not deducted, for instance, when he owes it to a person in his

<sup>1</sup> That is, debts owing by a *servus ordinarius* to his *servus vicarius* are not reckoned in the calculation. If the amount had been deducted as due to the *vicarius*, it would, when paid, have been again in the *peculium* of the *ordinarius*, and thus the deduction would have been nugatory.

74. *Ceterum dubium non est, quin is quoque qui iussu patris dominive contraxerit, cuique institoria vel exercitoria formula competit, de peculio aut de in rem verso agere possit. sed nemo tam stultus erit, ut qui aliqua illarum actionum sine dubio solidum consequi possit, in difficultatem se deducat probandi in rem patris dominive versum esse, vel habere filium servumve peculium, et tantum habere, ut solidum sibi solvi possit.* Is quoque cui tributoria actio competit, de peculio vel de in rem verso agere potest: sed huic sane plerumque expedit hac potius actione uti quam tributoria. nam in tributoria eius solius peculii ratio habetur quod in his mercibus *erit* quibus negotiatur filius servusve, *quodque* inde receptum erit, at in actione peculii, totius: et potest quisque tertia forte aut quarta vel etiam minore parte peculii negotiari, maximam vero partem *in prædiis vel in aliis rebus habere*; longe magis si potest adprobari id quod *detotum* in rem patris dominive versum esse, ad hanc actio-

74. Now there is no doubt that he who has entered into a contract (with a son or slave) at the bidding of the father or master, and who can avail himself of an institorian or exercitorian formula, may also bring the action styled *de peculio aut de in rem verso*. But no one who could recover the whole amount by one of the first-named actions, would be so foolish as to involve himself in the difficult task of proving that expenditure had been made on the business of the father or master, or that the son or slave had a *peculium*, and that so great that he could be paid his debt in full from it. Again, he for whom an *actio tributoria* lies, can also proceed by the *actio de peculio vel de in rem verso*: but for this man obviously it is generally better to resort to the latter rather than to the tributorian action. For in the tributorian action so much only of the *peculium* is taken into consideration as is comprised in the stock-in-trade wherewith the son or slave is trafficking, or has been taken therefrom as profit, but in the *actio peculii* the whole is considered; and it is possible for a man to traffic with a third, or fourth, or even a smaller part of his *peculium*, and to have the larger part invested in land or other property. Still more clearly ought the creditor to have recourse to this action if it can be proved that what is owed was altogether spent on the

## *Actio Noxalis.*

nem transire debet. nam, ut supra diximus, eadem formula et de peculio et de in rem verso agitur.

75. Ex maleficiis filiorum familias servorumve, veluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominove aut litis aestimationem sufferre aut noxae dedere: *erat* enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisve damnosam esse. (76.) Constitutae sunt autem noxales actiones aut legibus aut edicto. legibus, velut furti lege XII tabularum, damni iniuriae [velut] lege Aquilia. edicto Praetoris, velut iniuriarum et vi bonorum raptorum. (77.) Omnes autem noxales actiones capita sequuntur. nam si filius tuus servusve noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem pervenerit, cum illo incipit actio esse; si sui iuris coeperit

business of the father or master. For, as we said above<sup>1</sup>, the same formula deals both with the *peculium* and with outlays for the father's or master's profit.

75. For the wrongful acts of sons under *potestas* or of slaves, such as *furtum* or *injuria*, noxal actions have been provided, with the view of allowing the father or master either to pay the value of the damage done or to give up (the offender) as a *noxæ*<sup>2</sup>: for it would be inequitable that the offence of such persons should inflict damage on their parents or masters beyond the value of their persons. 76. Now noxal actions have been established either by *leges* or by the edict. By *leges*, as the action for theft under a law of the Twelve Tables<sup>3</sup>, or that for wrongful damage under the Lex Aquilia<sup>4</sup>: by the edict of the Praetor, as the actions for injury and for goods taken by force. 77. Again, all noxal actions follow the persons (of the delinquents)<sup>5</sup>. For if your son or slave have committed a noxal act, so long as he is in your *potestas* the action lies against you:

<sup>1</sup> IV. 73.

<sup>2</sup> "Noxa est corpus quod nocuit, id est servus, noxia ipsum maleficium." *Inst.* IV. 8. 1. See sub verb. *noxia*. The terminology of Justinian does not accord with that of Gaius, who in §§ 77 and 78 below uses *noxæ* where accord-

ing to Justinian's rule we should have had *noxia*.

<sup>3</sup> Tab. XII. l. 2, where the word *noxia* is used in the sense affixed to it by Justinian.

<sup>4</sup> III. 210.

<sup>5</sup> D. 9. 4. 43.

esse, directa actio cum ipso est, et noxae deditio extinguitur. ex diverso quoque directa actio noxalis esse incipit: nam si pater familias noxam commiserit, et hic se in adrogationem tibi dederit aut servus tuus esse coeperit, *quod* quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quae ante directa fuit. (78.) Sed si filius patri aut servus domino noxam commiserit, nulla actio nascitur: nulla enim omnino inter me et eum qui in potestate mea est obligatio nascitur. ideoque et si in alienam potestatem pervenerit aut sui iuris esse coeperit, neque cum ipso, neque cum eo cuius nunc in potestate est agi potest. unde quaeritur, si alienus servus filiusve noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio, an quiescat. nostri praeceptores intercidere putant, quia in eum casum deducta sit in quo actio consistere non potuerit, ideoque licet

but if he pass into the *potestas* of another, the action forthwith lies against that other; if he become *sui juris*, there is a direct action against himself, and the possibility of giving him up as a *nox* is at an end. Conversely, a direct action may become a noxal one: for if a *paterfamilias* have committed a noxal act, and then have arrogated<sup>1</sup> himself to you, or become your slave, which we have shown in our first commentary may happen in certain cases<sup>2</sup>, then the action which previously was directly against the offender begins to be a noxal action against you. 78. But if a son have committed a noxal act against his father, or a slave against his master, no action arises: for there can be no obligation at all between me and a person in my *potestas*. And so, though he may have passed into the *potestas* of another, or have become *sui juris*, there can be no action either against him or against the person in whose *potestas* he now is. Hence this question has been raised, whether in the event of an injury being committed against me by a slave or son of another person, who subsequently passes into my *potestas*, the right of action is altogether lost, or is only in abeyance. The authorities of our school think that it is lost, because the matter has been brought into a state in which there cannot possibly

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<sup>1</sup> l. 99.<sup>2</sup> l. 160.

### *Noxae Deditio.*

exierit de mea potestate, agere me non posse. diversae scholae auctores, quamdiu in mea potestate sit, quiescere actionem putant, cum ipse mecum agere non possum; cum vero exierit de mea potestate, tunc eam resuscitari. (79.) Cum autem filius familias ex noxali causa mancipio datur, diversae scholae auctores putant ter eum mancipio dari debere, quia lege XII tabularum cautum sit, *ne aliter filius de potestate patris exeat*, quam si ter fuerit mancipatus: Sabinus et Cassius ceterique nostrae scholae auctores sufficere unam mancipationem; crediderunt enim tres lege XII tabularum ad voluntarias mancipationes pertinere.

80. Haec ita de his personis quae in potestate *sunt*, sive ex contractu sive ex *maleficio* earum *controversia* esset. quod vero ad *cas* personas quae in manu mancipiove sunt, *ita* ius *dicitur*, ut cum *ex contractu* earum ageretur, nisi ab eo cuius iuri subiectae sint *in solidum* defendantur, bona quae earum

be an action, and that therefore I cannot sue, although the wrongdoer have passed subsequently from under my *potestas*. The authorities of the other school think that the right of action is in abeyance so long as he is in my *potestas*, since I cannot bring an action against myself; but that when the person has passed out of my *potestas*, then it is revived. 79. Again, when a son under *potestas* is given in *mancipium* for a noxal cause, the authorities of the opposite school hold that he ought to be given in *mancipium* thrice<sup>1</sup>, because by a law of the Twelve Tables it has been provided that unless a son be thrice mancipated he cannot escape from the *potestas* of his father<sup>2</sup>: but Sabinus and Cassius and the other authorities of our school hold that one mancipation is sufficient; for in their opinion the three sales specified by the law of the Twelve Tables refer to voluntary mancipations.

80. So much for those persons who are under *potestas*, when an action arises in consequence either of their contract or their delict. But so far as those who are in *manus* or *mancipium* are concerned the law is thus stated: if an action be brought on their contract, unless they be defended to the

<sup>1</sup> L. 132. 140.

<sup>2</sup> Tab. iv. l. 3.



## *Actiones alieno nomine.*

*forent, si eius iuri subiectae non essent, veneant. sed cum rescissa capitis diminutione imperio continenti iudicio [desunt 24 lin.]. (81.) — quamquam diximus — — permissum fuisse ei mortuos homines dedere, tamen et si quis cum dederit qui fato suo vita excesserit, aequè liberatur.*

82. *Nunc admonendi sumus agere posse quemlibet aut suo nomine aut alieno.* alieno, veluti cognitorio, procuratio, tutorio, curatorio: cum olim, quo tempore erant legis actiones, in usu fuisset alterius nomine agere non licere, nisi pro populo et libertatis causa. (83.) Cognitor autem certis verbis in litem coram adversario substituitur. nam actor ita cognitorem dat: QUOD

full amount by him to whose authority they are subject, all the property which would have been theirs, if they had not been subject to such authority, must be sold. But when the *capitis diminutio* is treated as non-existent<sup>1</sup> in an action based on the *imperium*<sup>2</sup> ..... 81. ...although, as we have said, it was never permitted to a defendant to surrender dead slaves (instead of paying the damage they had done); yet if a man give up a slave who has died a natural death he is free from liability, as in the other case.

82. We must next be reminded that a man can bring an action either in his own name or in the name of another: he brings one in the name of another, when, for instance, he sues as a *cognitor*, *procurator*, *tutor*, or *curator*: although formerly, when the *legis actiones* were in use, it was not allowable for a man to sue in the name of another, save in the case of a popular action<sup>3</sup> or in defence of freedom<sup>4</sup>. 83. A *cognitor*<sup>5</sup> then is substituted (for a principal) in a set form of words, in order to carry on a suit, and in the opponent's

<sup>1</sup> III. 84, IV. 38.

<sup>2</sup> IV. 103—109.

<sup>3</sup> These actions are treated of in D. 47. 23.

<sup>4</sup> That is, as *assertor libertatis*; see IV. 14, and note thereon.

<sup>5</sup> The institution of *cognitores* was precedent in point of time to that of *procuratores*, and naturally so, because the invasion of the principle that one person could not represent another was much less bare-

faced in the one case than in the other. Cicero mentions the *cognitor* in the *Orat. pro Rosc. Com.* c. 18. Festus, *sub verb.*, gives the same definition as in our text: "Cognitor est qui litem ulterius suscipit coram eo cui datus est. Procurator autem absentis nomine actor fit." A *cognitor* was always appointed to conduct a suit, a *procurator* frequently for other business: Paul. S. R. 1. 3. 2.

EGO A TE verbi gratia FUNDUM PETO, IN EAM REM LUCIUM TITIUM TIBI COGNITOREM DO; *adversarius* ita: QUANDOQUE TU A ME FUNDUM PETIS, IN EAM REM PUBLIUM MAEVIUM COGNITOREM DO. potest, ut actor ita dicat: QUOD EGO TECUM AGERE VOLO, IN EAM REM COGNITOREM DO; *adversarius* ita: QUANDOQUE TU MECUM AGERE VIS, IN EAM REM COGNITOREM DO. nec interest, praesens an absens cognitor detur: sed si absens datus fuerit, cognitor ita erit, si cognoverit *et susceperit* officium cognitoris. (84.) Procurator vero nullis certis verbis in litem *substituatur*; sed ex solo mandato, et absente et ignorante adversario, constituitur. quinetiam sunt qui putant *vel eum* procuratorem videri cui non sit mandatum, si modo bona fide accedat ad negotium et caveat ratam rem dominum habiturum. igitur et si non edat

presence. For the method in which the plaintiff appoints one is as follows: "Inasmuch as I am suing you for an estate," to take an example, "I appoint Lucius Titius to be my *cognitor* against you for that matter:" that in which the opposite party does so is: "Since you are suing me for the estate, I appoint Publius Maevius as my *cognitor* for that matter." Or it may be that the plaintiff uses these words: "As I desire to bring an action against you, I appoint a *cognitor* for the purpose;" and the defendant these: "Since you desire to bring an action against me, I appoint a *cognitor* for the purpose." The presence or absence of the *cognitor* at the time of appointment is not a material point: but if he be absent at the time he is appointed, he will become agent only on receipt of notice and acceptance of the duty. 84. A *procurator*, on the other hand, is substituted for the purposes of the suit without any special form of words: and is appointed by simple mandate<sup>1</sup>, and even in the absence or ignorance of the opposite party. Nay, there are some who think that even if there be no mandate given, a person may be considered a *procurator*, provided only he act in the business in good faith, and give sureties that what he does shall be ratified by his principal<sup>2</sup>. Therefore, even though the *pro-*

<sup>1</sup> III. 155 et seqq.

<sup>2</sup> Such a person was called *negotiorum gestor*, and the obligation

between him and the person he represents is of the class styled *ex contractu*. See App. (I).

mandatum procurator, *experiri potest*, quia saepe mandatum initio litis in obscuro est et postea aput iudicem ostenditur. (85.) Tutores autem et curatores quemadmodum constituentur, primo commentario rettulimus.

86. Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam convertit. *nam* si verbi gratia Lucius Titius *pro* Publio Maevio agat, ita formula concipitur: SI PARET NUMERIUM NEGIDIUM PUBLIO MAEVIO SESTERTIUM X MILIA DARE OPORTERE, IUDEX NUMERIUM NEGIDIUM LUCIO TITIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLVE. in rem quoque si agat, intendit Publii *Maevii* rem esse ex iure Quiritium, et condemnationem in suam personam convertit. (87.) Ab adversarii quoque parte si interveniat aliquis, cum quo actio constituitur, intenditur dominum dare oportere; condemnatio autem in eius personam convertitur qui iudicium accepit. sed cum in rem agitur, nihil *in* intentione facit eius persona

*curator* produce no mandate, he may conduct the action, because a mandate is frequently kept back at the commencement of a suit, and produced afterwards before the *iudex*.

85. As to the manner of appointing tutors and curators we have given information in our first commentary<sup>1</sup>.

86. He who sues in the name of another inserts his principal's name in the *intentio*, but in the *condemnatio* inserts his own instead. For if, for example, Lucius Titius be acting for Publius Maevius, the formula is thus drawn: "Should it appear that Numerius Negidius is bound to give 10,000 sesterces to Publius Maevius, do thou, *iudex*, condemn Numerius Negidius to pay the 10,000 sesterces to Lucius Titius: should it not so appear, acquit him." If again the action be *in rem*, he lays his *intentio* that such and such a thing is the property of Publius Maevius *ex jure Quiritium*, and then in the *condemnatio* changes to his own name. 87. If, again, there be on the part of the defendant some agent against whom the suit is laid, the statement in the *intentio* is to the effect that "the principal ought to give:" but in the *condemnatio* the name is changed to that of him who has undertaken the conduct of the case. But when the action is *in rem*, the name of the

<sup>1</sup> L. 144 et

cum quo agitur, sive suo nomine sive alieno aliquis iudicio interveniat: tantum enim intenditur rem actoris esse.

88. Videamus nunc quibus ex causis is cum quo agitur vel hic qui agit cogatur satisfacere. (89.) Igitur si verbi gratia in rem tecum agam, satis mihi dare debes. *aequum* enim visum est *te* ideo quod interea tibi rem, quae an *ad* te pertineat dubium *est*, possidere conceditur, cum satisfactione mihi cavere, ut si victus sis, nec rem ipsam restituas nec litis aestimationem sufferas, sit mihi potestas aut tecum agendi aut cum sponso-ribus tuis. (90.) Multoque magis debes satisfacere mihi, si alieno nomine iudicium accipias. (91.) Ceterum cum in rem actio duplex sit (aut enim per formulam petitoriam agitur aut per sponsionem): si quidem per formulam petitoriam agitur, illa stipulatio locum habet quae appellatur iudicatum solvi:

person against whom the action is brought has no effect on the *intentio*, whether such person be defending his own cause or acting as agent in a suit belonging to another: for the wording of the *intentio* is simply that "the thing is the plaintiff's." 88. Let us now see under what circumstances he who is sued or he who sues is under the necessity of finding sureties. 89. If then, to take an example, I bring an action *in rem* against you, you must furnish me with sureties. For since you are allowed to have the interim-possession of the thing, in respect of which there is a doubt whether the ownership is yours or not, it has been considered equitable that you should provide me with sureties, so that if you lose the suit and will neither deliver up the subject nor submit to the damages assessed, I may have the power of proceeding either against you or your sureties. 90. And still more ought you to furnish me with sureties, if you defend an action in the name of another person. 91. Inasmuch, then, as the action *in rem* may be brought in two different forms (for proceedings are taken either by a petitory formula or by a sponsion); if the former course be adopted, that particular stipulation is employed which has the name *iudicatum solvi* (that the award of the *judex* shall be paid)<sup>1</sup>: but if the latter, that

<sup>1</sup> "Iudicatum solvi stipulatio tres clausulas in unum collatas habet: de re iudicata, de re defendenda, de dolo malo:" D. 46. 7. 6. The three objects at which the *stipulatio* aimed were these, (1) to secure pay-

si vero per sponsionem, illa quae appellatur pro praede litis et vindiciarum. (92.) Petitoria autem formula haec est qua actor intendit rem suam esse. (93.) Per sponsionem vero hoc modo agimus. provocamus adversarium tali sponsione: SI HOMO QUO DE AGITUR EX IURE QUIRITUM MEUS EST, SESTER- TIOS XXV NUMMOS DARE SPONDES? deinde formulam edimus qua intendimus sponsionis summam nobis dare oportere. qua formula ita demum vincimus, si probaverimus rem nostram esse. (94.) Non tamen haec summa sponsionis exigitur: nec enim poenalis est, sed praeiudicialis, et propter hoc solum fit,

stipulation which is called *pro praede litis et vindiciarum*<sup>1</sup>. 92. A petitory formula is one in which the plaintiff claims the thing to be his own. 93. The mode of procedure by sponsion is as follows. We challenge our adversary in a sponsion running thus: "if the slave who is the subject of this action be mine *ex jure Quiritium*, do you engage to give me 25 sesterces?" Then we serve him with a formula, in the *intentio* of which we assert that the amount of the sponsion is due to us: and under this formula we are victorious only on our proving that the thing is ours<sup>2</sup>. 94. The amount of this sponsion is not, however, in any case exacted: for it is not penal but praejudicial<sup>3</sup>, being introduced for the sole

ment of the award of the *iudex*, the *litis aestimatio*, in case of non-resti- tution of the subject of the suit, the *lis*: (2) to secure the attendance of the defendant in court: (3) to pre- vent any acts being done by him to the detriment of the subject of the suit. The plaintiff, if successful, could of course sue on his judgment, by *pignoris capio* for instance; but it was more convenient to sue his opponent on his stipulation; and besides, the fact of there being sure- ties, multiplied the chances of ob- taining adequate compensation.

<sup>1</sup> See IV. 16 and notes thereon: also IV. 94 and Cic. *in Verr.* II. I. c. 45 with the commentary of Pseudo Asconius on the passage (p. 191 ed. Orell.).

<sup>2</sup> We see then that by this device

the *actio in rem* directed against no one in particular, has been con- verted into an *actio in personam* against our opponent. We sue him for the amount of a wager; but whether he has won or lost that wager can only be decided by the court pronouncing its opinion on our claim of ownership.

<sup>3</sup> "*Praejudicium*," says Zimmern, "in the language of practice, was not exactly a preliminary proceed- ing, in the same sense as *actio prae- judicialis*, but a decision which might sooner or later be appealed to as a precedent." (Zimmern, traduit par Etienne, *Traité des actions*, pp. 295, 296.)

There is some difficulty at first sight in comprehending how his victory in the sponsion benefited

ut per eam de re iudicetur. unde etiam is cum quo agitur non restipulatur: ideo autem appellata est PRO PRAEDE LITIS VINDICIARUM stipulatio, quia in locum praedium successit; quia olim, cum lege agebatur, pro lite et vindiciis, id est pro re et fructibus, a possessore petitori dabantur praedes. (95.) Ceterum si aput centumviros agitur, summam sponsionis non per formulam petimus, sed per legis actionem: sacramento enim reum provocamus; eaque sponsio sestertiorum CXXV nummorum fit, scilicet propter legem — — —. (96.) Ipse autem qui in rem agit, si suo nomine agit, satis non dat. (97.) ac nec si per

purpose of obtaining a decision on the main issue by its means. Hence it is that the defendant does not enter into a restipulation. This stipulation again is called *pro praede litis et vindiciarum*, because it was substituted for the *praedes*<sup>1</sup>, who in olden times, when the proceedings were by *legis actio*, used to be assigned by the interim-possessor to the plaintiff, for the assuring of the *lis et vindiciae*, i.e. the thing itself and the profits thereof. 95. But when the action is tried before the *centumviri*<sup>2</sup> we do not sue for the amount of the sponsion by a formula, but by a *legis actio*; for we challenge the defendant by the sacramental wager; and the sponsion arising out of it is to the amount of 125 sesterces, according to the Lex ..... 96. In the case of an *actio in rem* the plaintiff, if suing in his own name, does not furnish sureties. 97. Nay,

the plaintiff. He had certainly gained his wager, but the real object of the suit was not the winning of a trifle such as 25 sesterces, but the securing of a transfer to him by his adversary of the lands in debate. He could not proceed on his judgment, for an *actio iudicati* was not intended to transfer possession, and this was what his opponent now wrongfully withheld from him. Besides, although it had been decided that the field was his, the verdict he had obtained was one for 25 sesterces, and for this alone could he have brought an *actio iudicati*, if such action had been allowed him at all; but we know that it was refused him, for says

Gaius: "nec enim poenalis est summa sed praejudicialis." How then did he proceed? On the stipulation "*pro praede litis et vindiciarum*," for therein his adversary had bound himself by a verbal contract to let the lands, or their value, follow the judgment as to the wager. If then the lands were not delivered, he had a personal action on this stipulation, and could in lieu of the lands, get their value, or possibly more than their value, as the amount secured would no doubt be such as to make it worth the defendant's while to give the lands rather than forfeit his bond.

<sup>1</sup> See note on IV. 16.

<sup>2</sup> IV. 31.

cognitorem quidem agatur, ulla satisfactio vel ab ipso vel a domino desideratur. cum enim certis et quasi sollemnibus verbis in locum domini substituaturn cognitior, merito domini loco habetur. (98.) Procurator vero si agat, satisfacere iubetur ratam rem dominum habiturum: periculum enim est, ne iterum dominus de eadem re experiatur. quod periculum non intervenit, si per cognitorem actum fuit; quia de qua re quisque per cognitorem egerit, de ea non magis amplius actionem habet quam si ipse egerit. (99.) Tutores et curatores eo modo quo et procuratores satisfacere debere verba edicti faciunt, sed aliquando illis satisfactio remittitur. (100.) Haec ita si in rem agatur: si vero in personam, ab actoris quidem parte quando satisfacti debeat quaerentes, eadem repetemus quae diximus in actione qua in rem agitur. (101.) ab eius vero parte cum quo agitur, si quidem alieno nomine aliquis interveniat,

even though a suit be brought by means of a *cognitor*, no sureties are required either from him or his principal. For since the *cognitor* is put into the place of the principal in words of a formal and almost solemn character<sup>1</sup> he is fairly regarded as occupying the position of the principal. 98. Hence when a *procurator* brings an action, he is ordered to furnish sureties that his principal will ratify his proceedings: for there is the risk that the principal may again sue for the same thing<sup>2</sup>. But when the proceedings are conducted by means of a *cognitor* this risk does not exist, because when a man sues by such an agent, he no more has a second action than he would have if he himself sued. 99. According to the letter of the edict tutors and curators ought to furnish sureties in the same manner as *procurators* must; but from this necessity of finding sureties they are sometimes excused. 100. The above are the rules when the action is *in rem*, but if it be *in personam*, what we have already stated with reference to the action *in rem* will be our answer to those who want to know when sureties ought to be furnished on the part of the plaintiff. 101. As to the case of a defendant,—when a man defends in another's name, sureties must always be furnished,

<sup>1</sup> IV. 83.

*l. res* at some length in *pro Quinct.*

<sup>2</sup> Cicero treats the subject of  
by *cognitores* and

c. 7, 8.



omnimodo satisfdari debet, quia nemo alienae rei sine satisfactione defensor idoneus intelligitur. sed si quidem cum *cognitore* agatur, dominus satisfacere iubetur; si vero cum procuratore, ipse procurator. idem et de tutore et de curatore iuris est. (102.) Quod si proprio nomine aliquis iudicium *accipiat* in personam, certis ex causis satisfdari solet, quas ipse Praetor significat. quarum satisfactionum duplex causa est. nam aut propter genus actionis satisfdatur, aut *propter personam*, quia suspecta sit. propter genus actionis, velut iudicati deensive, aut cum de moribus mulieris agetur: propter personam, velut si cum eo agitur qui decoxerit, cuiusve bona a creditoribus possessa proscriptave sunt, sive cum eo herede agatur quem Praetor suspectum aestimaverit.

103. Omnia autem iudicia aut legitimo iure consistunt aut

because no one is considered competent to take up another's case unless there be sureties<sup>1</sup>: but the furnishing thereof will be laid on the principal, when the proceedings are against a *cognitor*, whilst if they be against a *procurator*, the *procurator* himself must provide them. The latter is also the rule applying to a tutor or curator. 102. On the other hand, if a man be defendant on his own account in an action *in personam*, he has to give sureties in certain cases wherein the Praetor has so directed. For such furnishing of sureties there are two reasons, as they are provided either on account of the nature of the action, or on account of the untrustworthy character of the person. On account of the nature of the action, in such actions as those on a judgment or for money laid down by a sponsor<sup>2</sup> or that *de moribus mulieris*<sup>3</sup>: on account of the person when the action is against one who has squandered his property, or one whose goods have been taken possession of or advertised for sale by his creditors, or when the action is brought against an heir whose conduct the Praetor considers suspicious<sup>4</sup>.

103. All actions before *judices* are either founded on the statute law or based on the *imperium* of the Praetor<sup>5</sup>. 104.

<sup>1</sup> D. 3. 3. 46. 2. D. 3. 3. 53. D. 46. 7. 10.

<sup>2</sup> IV. 25.

<sup>3</sup> See Ulpian, VI. 12, 13.

<sup>4</sup> Cic. *pro Quinct.* c. 8. D. 42. 5. 31. D. 42. 5. 33. 1.

<sup>5</sup> III. 180, 181.

imperio continentur. (104.) Legitima sunt iudicia quae in urbe Roma vel intra primum urbis Romae miliarium inter omnes cives Romanos sub uno iudice accipiuntur: eaque e lege Julia iudiciaria, nisi in anno et sex mensibus iudicata fuerint, expirant. et hoc est quod vulgo dicitur, e lege Julia litem anno et sex mensibus mori. (105.) Imperio vero continentur recuperatoria et quae sub uno iudice accipiuntur interveniente peregrini persona iudicis aut litigatoris. in eadem causa sunt quaecumque extra primum urbis Romae miliarium tam inter cives Romanos quam inter peregrinos accipiuntur. ideo autem imperio contineri iudicia dicuntur, quia tamdiu valent, quamdiu is qui ea praecepit imperium habebit. (106.)

Of the former kind are those which are heard before a single *iudex* in the city of Rome or within the first milestone from the city of Rome, wherein all the parties are Roman citizens: and these, according to the provisions of the Lex Julia Iudiciaria<sup>1</sup>, expire unless a decision be pronounced upon them within a year and six months. This is what is meant by the common saying that a suit dies in a year and six months by the Lex Julia Iudiciaria<sup>2</sup>. 105. In the other class are comprised actions before *recuperatores*<sup>3</sup>, and those which are heard before a single *iudex*, when a foreigner is concerned either as *iudex* or litigant. In the same category are all actions heard beyond the first milestone from the city of Rome, whether the parties in them be citizens or foreigners. These actions are said to be "based on the *imperium*," because they are effectual only during such time as the Praetor who granted them remains in office (retains his *imperium*). 106. If then the

<sup>1</sup> Temp. 2

<sup>2</sup> D. 46. 7. 2. From the following passages it will be seen that the an action to die, if done wilfully, was sometimes equivalent to fraud or *dolus*, D. 4. 3. 18. 4 D. 42. 8. 3. 1.

were possible at their original institution.

on from two nations at variance as to some right or question, to act as umpires and arrange the dispute amicably. Hence the name was applied to persons who

had a function analogous to that of a

In accordance with the notion of their en by different parties, they would in all cases be more than in number; and so the name came to be applied to others who sat (two or more together) to decide cases connected with the *jus gentium*, even when both parties were Roman citizens. See also notes on l. 20, 18.

Et siquidem imperio continenti iudicio actum fuerit, sive in rem sive in personam, sive ea formula *quae* in factum concepta est sive ea quae in ius habet intentionem, postea nihilominus ipso iure de eadem re agi potest. et ideo necessaria est exceptio rei iudicatae vel in iudicium deductae. (107.) at vero si legitimo iudicio in personam actum sit ea formula quae iuris civilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio supervacua est. si vero vel in rem vel in factum actum fuerit, ipso iure nihilominus postea agi potest, et ob id exceptio necessaria est rei iudicatae vel in iudicium deductae. (108.) Alia causa fuit olim legis actionum. nam qua de re actum semel erat, de ea postea ipso iure agi non

action resorted to be one "based on the *imperium*," whether it be *in rem* or *in personam*, and whether it have a formula the *intentio* whereof is *in factum* or one whereof the *intentio* is *in ius*<sup>1</sup>, another action may nevertheless according to the letter of the law be brought afterwards upon the same facts. And therefore there is need of the *exceptio rei judicatae* or the *in iudicium deductae*<sup>2</sup>. 107. But if proceedings *in*

by action based on statute law be taken under a formula which has a civil law *intentio*, by the letter of the law there cannot be a second action on the same facts, and therefore the *exceptio* is superfluous. But if the action be *in rem*, or be a personal action *in factum*, another action may nevertheless according to the letter of the law<sup>3</sup> be afterwards brought upon the same facts, and therefore the *exceptio rei judicatae* or that *in iudicium deductae* is necessary. 108. In olden times the case was different with the *legis actiones*, for when once an action had been tried about any matter, there could not according to the letter of the law be another action on the same facts: and there was not any employment

<sup>1</sup> IV. 45.

<sup>2</sup> III. 181.

<sup>3</sup> An obligation is said to be destroyed *ipso iure* in two cases; firstly when there had already been a judgment in a *legitimum iudicium*, in which cases the Praetor will grant formula for a second action; and this is the case dealt with here: secondly, when there had been no action, but a payment real or fictitious,

(*solutio* or *acceptilatio*), had taken place. A formula would then be granted, and the plaintiff would not apply for the insertion of an *exceptio*, pleading, as it were, a general issue, and establishing his defence *in iudicio* by proof of the payment: this latter case is however foreign to the topic Gaius is here discussing. See *Thémis*, VI. p.

### *Perpetual and annual actions.*

poterat: nec omnino ita, ut nunc, usus erat illis temporibus exceptionum. (109.) Ceterum potest ex lege quidem esse iudicium, sed legitimum non esse; et contra ex lege non esse, sed legitimum esse. *nam si* verbi gratia ex lege Aquilia vel Quinia vel Furia in provinciis agatur, imperio continebitur iudicium: idemque iuris est et si Romae apud recuperatores agamus, vel apud unum iudicem interveniente peregrini persona. et ex diverso si ex ea causa, ex qua nobis edicto Praetoris datur actio, Romae sub uno iudice inter omnes cives Romanos accipiatur iudicium, legitimum est.

110. Quo loco admonendi sumus, eas quidem actiones quae ex lege senatusve consultis proficiuntur, perpetuo solere Praetorem accommodare: eas vero quae ex propria ipsius iurisdictione pendent, plerumque intra annum dare. (111.) aliquando

at all of *exceptions* as there is now. 109. Further, an action may be derived from a *lex* and yet not be "statutable," and, conversely, it may not be derived from a *lex* and yet be "statutable." For if, to take an example, an action be brought in the provinces under the *Lex Aquilia*<sup>1</sup> or *Quinia*<sup>2</sup> or *Furia*<sup>3</sup> the action will be one "based upon the *imperium*:" and the rule is the same if we bring an action at Rome before *recuperatores*<sup>4</sup>, or before one *iudex* when there is a foreigner connected with the suit<sup>5</sup>. So, conversely, if in a case where an action is granted under the Praetor's edict the trial be at Rome before a single *iudex* and all the parties be Roman citizens, the action is "statutable."

110. At this point we must be reminded that the Praetor's practice is to grant at any time<sup>6</sup> those actions which arise from a *lex* or from *senatusconsulta*, but in general to grant those which spring from his own special jurisdiction only within one year. 111. Sometimes, however, the Praetor in

<sup>1</sup> III. 210.

<sup>2</sup> Nothing is known about this law.

<sup>3</sup> The *Lex Furia de Sponsu*: for this *lex* is stated in III. 121 to be applicable to Italy only as a matter of course, and therefore if carried into effect in a province must have been a title in the edict of the *praetor* of that province, and so not "statuta-

ble," but "based on the *imperium*."

<sup>4</sup> Note on IV. 105.

<sup>5</sup> Either as *iudex* or litigant; see IV. 105.

<sup>6</sup> The Praetor granted these actions any length of time after the ground of action arose: the others he only allowed to be brought if the formula were applied for within one year. It is very likely that the rule

tamen *ipse quoque Praetor in actionibus imitatur ius legitimum* : quales sunt eae quas *Praetor bonorum possessoribus ceterisque qui heredis loco sunt accommodat*. *furti quoque manifesti actio*, quamvis ex ipsius Praetoris iurisdictione *proficiscatur*, perpetuo datur ; et merito, cum pro capitali poena pecuniaria constituta sit.

112. Non omnes actiones quae in aliquem aut ipso iure competunt aut a Praetore dantur, etiam in heredem aequae competunt aut dari solent. est enim certissima iuris regula, ex maleficiis poenales actiones in heredem nec competere nec Praetorem dare, velut furti, vi bonorum raptorum, iniuriarum, damni iniuriae : sed heredibus actoris huiusmodi actiones competunt nec denegantur, excepta iniuriarum actione, et si qua

his actions imitates the precedent of the statutable actions<sup>1</sup> : for instance, in those actions which he grants to *bonorum possessoribus*<sup>2</sup> and others who occupy the position of heir. The *actio furti manifesti*<sup>3</sup> also, though issuing from the jurisdiction of the Praetor himself, is granted at any time ; and very properly, since the Praetor's pecuniary penalty has been imposed instead of the capital penalty (of the Twelve Tables).

112. Not every action which is either maintainable at strict law or granted by the Praetor against any one, is equally maintainable or granted against his heir. For there is a firmly-established rule of law that penal actions on delicts do not lie against the heir (of the offender), nor will the Praetor grant them, for instance the actions *furti*, *vi bonorum raptorum*, *iniuriarum*, *damni iniuriae*<sup>4</sup> : but actions of this kind lie for the heir (of the person aggrieved) and are not refused to him, except the action *iniuriarum*<sup>5</sup> and any other action that may resemble

originally was that they could only be applied for whilst the same Praetor was in office whose year had witnessed the offence, but subsequently the space of time was a definite one, and irrespective of the possible retirement of one Praetor and succession of another. After the time of Theodosius *perpetuum* came to have a restricted meaning, and a *perpetua* was one which could be brought

within 30, or in some cases 40 years, and no action thenceforward was actually "perpetual."

<sup>1</sup> Sc. Grants them *perpetuo*.

<sup>2</sup> III. 32, IV. 34.

<sup>3</sup> III. 189.

<sup>4</sup> III. 182—223.

<sup>5</sup> The reason for this is that the *actio iniuriarum* was regarded by the Roman law as a purely personal remedy ; "the heir had suffered

alia similis *inveniat*ur actio. (113.) Aliquando tamen *etiam* ex contractu actio neque heredi neque in heredem competit. nam adstipulatoris heres non habet actionem, *et* sponsoris *et* fidepromissoris heres non tenetur.

114. Superest ut dispiciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciat actori, quid officio iudicis conveniat: utrum absolvere, an ideo potius damnare, quia iudicii accipiendi tempore in ea causa fuit, ut damnari debeat. nostri praeceptores absolvere eum debere existimant: nec interesse cuius generis fuerit iudicium. et hoc est quod volgo dicitur Sabino et Cassio placere omnia iudicia esse absolutoria. *De bonae fidei iudiciis autem idem sentiunt diversae scholae auctores, quod in his quidem iudiciis liberum es.*

it. 113. Sometimes, however, even an action on a contract does not lie for or against the heir of a party: for the heir of an *adstipulator* has no action<sup>1</sup>, and the heir of a *sponsor* or *fidepromissor*<sup>2</sup> is not bound.

114. The next point for our consideration is this: supposing after the matter has been submitted to the *judex*, but before award the defendant make satisfaction to the plaintiff, what is the duty of the *judex*? Ought he to acquit, or rather to condemn him because at the time when the matter came before the *judex* he was in such a plight that he ought to be condemned<sup>3</sup>. Our authorities hold that the *judex* ought to acquit him: and say that the nature of the action<sup>4</sup> is a matter of no importance. And hence comes the common saying, that Sabinus and Cassius held "that all issues before a *judex* allow of acquittal." The authorities of the opposite school hold the same opinion with regard to actions *bonae*

no wrong," says Ulpian, in D. 47. 10. 13. pr., and Paulus, referring to a similar case, says the original action is "*vindictae non pecuniae*," D. 37. 6. 2. 4.

Other actions of like kind are those of a *patronus* against a *libertus* who has sued him without the Praetor's leave, D. 2. 4. 24; those against a man who has by violence prevented

an arrest, D. 2. 7. 5. 4; those against *calumniatores*, D. 3. 6. 4, &c. &c.

<sup>1</sup> III. 114.

<sup>2</sup> III. 120.

<sup>3</sup> His own admission, evidenced by his coming to terms, shows that he was deserving of condemnation.

<sup>4</sup> Sc. Whether it be *stricti juris* or

officium iudicis. tantumdem *etiam de in rem* actionibus putant — [*desunt* 17 *lin.*].

115. Sequitur ut de exceptionibus dispiciamus. (116.) Comparatae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur: saepe enim accidit, ut quis iure civili teneatur, sed iniquum sit cum iudicio condemnari. velut si stipulatus sim a te pecuniam tamquam credendi causa numeraturus, nec numeraverim. nam eam pecuniam a te peti posse certum est; dare enim te oportet, cum ex stipulatu teneris: sed quia iniquum est te eo nomine condemnari, placet per exceptionem doli mali te defendi debere. item si pactus

because in these the discretion of the *iudex* is unfettered. With regard to actions *in rem* they think that it is so far.....

115. The next matter for our consideration is that of exceptions<sup>1</sup>. 116. Exceptions then are provided for the purpose of protecting defendants: for it frequently happens that a man is liable according to the civil law, and yet it would be inequitable that he should be condemned in the suit<sup>2</sup>: for instance, if I have stipulated for money from you on the pretence that I am about to pay you money by way of loan, and then do not so pay it. In such a case it is clear that the money can be sued for from you: for it is your duty to pay it since you are bound by the stipulation: but as it is inequitable that you should be condemned on account thereof, it is held that you must be defended by the *exceptio*

So also if I have made a pact with you not to

<sup>1</sup> A defendant might reply to the plaintiff's demand in three different ways: (1) by a denial of the facts alleged, which is styled by later writers *litis contestatio mere negativa*; (2) by asserting facts which destroyed the right of action *ipso jure*, although that might originally have been well-founded, such facts for instance as payment real or fictitious, (*solutio* or *acceptilatio*); of such replies the *iudex* as a matter of course took notice, without any express direction in the *formula* that he should do so: (3) by asserting facts which did not destroy the right of action

*ipso jure*, but on account of which the Praetor allowed a defence, *quia iniquum foret cum condemnari*; and of these the *iudex* could take no notice, unless the cognizance of them was by the *formula* expressly given to him. Such facts, included in a *formula* by means of a special clause, were *exceptiones*. See Mackelley, *Syst. Jur. Rom.* § 200 a. p. 206. Exceptions then were equitable defences, creatures of the formulary system, and not in existence during the period of the *legis actiones*.

<sup>2</sup> See Cic. *de Invent.* II. 19, 20, *de Off.* III. 14, 15.



fuero tecum, ne id quod mihi debeas a te petam, nihilominus id ipsum a te petere possum DARE MIHI OPORTERE, quia obligatio pacto convento non tollitur: sed placet debere me petentem per exceptionem pacti conventi repelli. (117.) In his quoque actionibus quae *non* in personam sunt exceptiones locum habent. velut si metu me coegeris aut dolo induxeris, ut tibi rem aliquam mancipio dem; nam si eam rem a me petas, datur mihi exceptio per quam, si metus causa te fecisse vel dolo malo arguero, repelleris. item si fundum litigiosum sciens a non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omnimodo summo-veris. (118.) Exceptiones autem alias in edicto Praetor habet propositas, alias causa cognita accommodat. quae omnes vel ex

sue you for that which you owe to me, I can nevertheless sue for that very thing from you by the formula "that you ought to give me it," because the obligation is not removed by the agreement made between us; but it is held that I ought, if I sue, to be repelled by the *exceptio pacti conventi*<sup>1</sup>. 117. Exceptions are also resorted to in actions which are not *in personam*, as for example if you have compelled me by fear, or induced me by fraud to give you something by mancipation; for if you sue me for that thing, an exception is granted me, by which you will be defeated if I prove that you acted with the intent of causing fear or with fraud. Again, if you have with full knowledge purchased from a non possessor an estate which is a subject of suit, and seek to get it from the possessor, an exception is opposed to you by which you will be completely defeated<sup>2</sup>. 118. Some exceptions are published by the Praetor in his edict, some he grants on cause being shown<sup>3</sup>: but all of them are founded either on *leges* or

<sup>1</sup> See note on III. 89.

<sup>2</sup> From a passage in the *Fragmenta de Jure Fisci*, § 8, it would appear that it was a somewhat serious offence to purchase a *res litigiosa*, for by an edict of Augustus a penalty of 50 sester tia was imposed, besides the bargain being declared void. See on the same subject D. 44. 6. 1 and D. 20. 3. 1. 2.

<sup>3</sup> Although an exception of this

latter kind was founded on a particular state of facts for which there was no nominate exception in the edict, it would be *in jus concepta*: since it was, if we may coin a term, an *exceptio in factum praescriptis verbis*, and therefore analogous to the action of the same name, which as we know was an inquiry into the law applicable to some admitted set of facts.

legibus vel ex his quae legis vicem optinent substantiam capiunt, vel ex iurisdictione Praetoris proditae sunt.

119. Omnes autem exceptiones in contrarium concipiuntur, *quam* adfirmat is cum quo agitur. nam si verbi gratia reus dolo malo aliquid actorem facere dicat, qui forte pecuniam petit quam non numeravit, sic exceptio concipitur: SI IN EA RE NIHIL DOLO MALO AULI AGERII FACTUM SIT NEQUE FIAT. item si dicatur contra pactionem pecunia peti, ita concipitur exceptio: SI INTER AULUM AGERIUM ET NUMERIUM NEGIDIUM NON CONVENIT NE EA PECUNIA PETERETUR. et denique in ceteris causis similiter concipi solet. ideo scilicet, quia omnis exceptio obicitur quidem a reo, sed ita formulae inseritur, ut condicionalem faciat condemnationem, id est ne aliter iudex eum cum quo agitur condemnet, quam si nihil in ea re *qua* de agitur dolo actoris factum sit; item ne aliter iudex eum condemnet, quam si nullum pactum conventum *de* non petenda pecunia factum erit.

enactments having the force of *leges*, or else are derived from his own jurisdiction.

119. Now all exceptions are worded in the negative of the defendant's affirmation. For if, to take an instance, the defendant assert that the plaintiff is doing something fraudulently, suing, for example, for money which he has never paid over<sup>1</sup>, the exception is worded thus: "if nothing has been done or is being done in this matter fraudulently on the part of Aulus Agerius." Again if it be alleged that money is sued for contrary to agreement, the exception is thus drawn: "if it has not been agreed between Aulus Agerius and Numerius Negidius that that money shall not be sued for:" and, in a word, there is a similar mode of drawing in all other cases. The reason of this is, no doubt, because every exception is proposed by the defendant, but added to the formula in such manner as to make the *condemnatio* conditional, *i.e.* that the *iudex* is not to condemn the defendant unless nothing have been done fraudulently on the part of the plaintiff in the matter in question; or again that the *iudex* is not to condemn him unless no agreement have been made that the money should not be sued for.

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<sup>1</sup> IV. 116.

120. Dicuntur autem exceptiones aut peremptoriae aut dilatoriae. (121.) Peremptoriae sunt quae perpetuo valent, nec evitari possunt, velut quod metus causa, aut dolo malo, aut quod contra legem senatusve consultum factum est, aut quod res iudicata est vel in iudicium deducta est, item pacti conventi quo pactum est ne omnino pecunia peteretur. (122.) Dilatoriae sunt exceptiones quae ad tempus nocent, veluti illius pacti conventi quod factum est verbi gratia ne intra quinquennium peteretur: finito enim eo tempore non habet locum exceptio. cui similis exceptio est litis dividuae et rei residuae. nam si quis partem rei petierit et intra eiusdem praeturam reliquam partem petat, hac exceptione summovetur, quae appellatur litis dividuae. item si is qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit, ut ad alios iudices eant, si intra eiusdem praeturam de his quae ita distulerit agat, per hanc exceptionem quae appella-

120. Exceptions are said to be either peremptory or dilatory. 121. Those are peremptory which are available at all times, and which cannot be avoided, for example the exception *metus causâ*, or *dolo malo*, or that something has been done contrary to a *lex* or *senatus-consultum*, or that the matter has been already adjudicated upon, or laid before a *judex*<sup>1</sup>, and so also that an agreement has been made that the money should not be sued for under any circumstances. 122. Dilatory exceptions are those which are good defences for a certain time only, as that of an agreement having been made to the effect that money should not be sued for, say, within five years; for on the expiration of that time the exception is no longer available. Similar to this is the exception *litis dividuae*, and that *rei residuae*. For if a person have brought his action for a part of the thing claimed, and then sue for the remainder within the time of office of the same Praetor, he is met by the exception styled *litis dividuae*<sup>2</sup>. And so too, if he who had several suits against the same defendant have brought some and postponed others, in order that they may go before other *judices*, and then pursue those others which he had postponed within the time of office of the same Praetor, he is met by the

<sup>1</sup> IV. 106.<sup>2</sup> IV. 56.

### *Dilatory exceptions.*

tur rei residuae summovetur. (123.) Observandum est autem ei cui dilatoria obicitur exceptio, ut differat actionem: alioquin si obiecta exceptione egerit, rem perdit. nec enim post illud tempus quo integra re evitare poterat, adhuc ei potestas agendi superest, re in iudicium deducta et per exceptionem perempta. (124.) Non solum autem ex tempore, sed etiam ex persona dilatoriae exceptiones intelliguntur, quales sunt cognitoriae; velut si is qui per edictum cognitorem dare non potest per cognitorem agat, vel dandi quidem cognitoris ius habeat, sed eum det cui non licet cognituram suscipere. nam si obiciatur exceptio cognitoria, si ipse talis erit, ut ei non liceat cognitorem dare, ipse agere potest: si vero cognitori non liceat cognituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et *potest* tam hoc quam illo modo evitare exceptionem. quod si dissimulaverit *eam* et per cognitorem *egerit*, *rem perdit*. (125.) Sed peremptoria quidem

exception called *rei residuae*. 123. He then against whom a dilatory exception has been pleaded ought to be careful to put off his action: for otherwise, if he go on with his action after the exception has been pleaded, he will lose the cause. For not even after the time when he could have avoided it if no prior proceedings had been taken, has he any longer a right of action surviving, when the matter has once been laid before a *judex* and overthrown by the exception<sup>1</sup>. 124. Exceptions are dilatory not only in relation to time, but also in relation to the person; of which latter kind are cognitory exceptions; as in the case of a person who, though incapacitated by the edict from nominating a *cognitor*<sup>2</sup>, nevertheless employs one to carry on an action, or in that of a person who has the right of nominating a *cognitor*, but nominates one who is unfit for the office: for if the *exceptio cognitoria* be pleaded, then, supposing the principal be disqualified from nominating a *cognitor*, he can in person carry on the action; but if the *cognitor* be disqualified from undertaking the office, the principal has free choice of suing either by means of another *cognitor* or in person; and he can by either of these modes avoid the exception; but if he treat the exception with contempt<sup>3</sup> and sue by the first cog-

<sup>1</sup> IV. 131.

<sup>2</sup> IV. 83.

<sup>3</sup> This is not the ordinary mean-

ing of *dissimulare*, but that it here bears the sense we have assigned to

exceptione cum reus *per errorem* non fuit usus, in integrum restituitur *servandae* exceptionis gratia: dilatoria vero si non fuit usus, an in integrum restituatur, quaeritur.

126. Interdum evenit, ut exceptio quae prima facie iusta videatur, inique noceat actori. Quod cum accidat, alia adiectione opus est adiuvandi actoris gratia: quae adiectio replicatio vocatur, quia per eam replicatur atque resolvitur *vis* exceptionis. nam si verbi gratia pactus sim tecum, ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et si agam tecum, excipias tu, ut ita demum mihi condemneris, si non convenerit ne eam pecuniam peterem, nocet mihi exceptio pacti conventi; namque nihilominus hoc verum manet, etiam si postea in contrarium pacti simus. sed quia iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto *hoc* modo:

*nitor*, he loses his case. 125. When, however, the defendant has through some error not availed himself of a peremptory exception, he is restored to his former position<sup>1</sup> for the sake of preserving the exception: but if he have omitted to use a dilatory exception, it is doubtful whether he can be so restored.

126. It sometimes happens that an exception, which at first sight appears just, unfairly prejudices the plaintiff. When this occurs, another addition (to the formula) is needed to relieve the plaintiff, and this is called a *rephatio*, because by means of it the effect of the exception is rolled back again and untied. Thus, for example, supposing I have agreed with you not to sue you for money you owe to me, and that afterwards we make an opposite agreement, i.e. that I may sue you: then should I bring my action and you meet me with an exception that you ought to be condemned to pay me "if there has been no agreement that I should not sue for the money," this exception *pacti conventi* is to my prejudice; for the agreement is a matter of fact, even though we have since agreed to the contrary. But as it would be unjust for me to be kept out of my rights by the exception, a replication is allowed me on the

it is obvious by reference to Theophilus (i. 1), who (evidently translating this sentence) writes: *εἰ δὲ ὁ*

*ἀκτωρ καταφρονήσει τῆς τοιαύτης παραγραφῆς.*

<sup>1</sup> See note on IV.

SI NON POSTEA CONVENERIT UT EAM PECUNIAM PETERE LICERET. item si argentarius pretium rei quae in auctionem venierit persequatur, obicitur ei exceptio, ut ita demum emptor damnetur, si ei res quam emerit tradita esset: *quae est iusta exceptio.* sed si in auctione praedictum est, ne ante emptori traderetur res quam si pretium solverit, replicatione tali argentarius adiuvatur: AUT SI PRAEDICTUM EST NE ALITER EMPTORI RES TRADERETUR QUAM SI PRETIUM EMPTOR SOLVERIT. (127.) Interdum autem evenit, ut rursus replicatio quae prima facie iusta sit, inique reo noceat. quod cum accadat, adiectione opus est adiuvandi rei gratia, quae duplicatio vocatur. (128.) Et si rursus ea prima facie iusta videatur, sed propter aliquam causam inique actori noceat, rursus *ea* adiectione opus est qua actor adiuvetur, quae dicitur triplicatio. (129.) Quarum

ground of the subsequent agreement, thus: "if it have not been subsequently agreed that he may sue for the money." Again suppose a banker seek to recover the price of a thing which has been sold at auction, and the exception be raised against him, that the purchaser is to be condemned to pay only "if the thing which he purchased have been delivered:" this is a good exception<sup>1</sup>; but if at the auction it has been stated at the outset that the thing is not to be delivered to the purchaser until he pay the price, the banker is relieved by a replication to the following effect: "or if it has been announced at the outset that the thing is not to be delivered to the purchaser unless the purchaser has paid the price." 127. But sometimes it happens that a replication in its turn, which at first sight is a fair one, presses unduly on the defendant: and when this occurs there is need of an addition (to the formula) for the purpose of assisting the defendant; which is called a *duplicatio*. 128. And if again this appear at first sight fair, but for some reason or other press unduly on the plaintiff, another addition is needed for the relief of the plaintiff; which is called a *triplicatio*. 129. The variety of business transactions has caused the use of all these additions

<sup>1</sup> The general rule is that goods need not be paid for till delivery is made, but a special agreement to the contrary is valid, as the text states.

omnium adiectionum usum interdum etiam ulterius quam diximus varietas negotiorum introduxit.

130. Videamus etiam de praescriptionibus quae receptae sunt pro actore. (131.) saepe enim ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est. velut cum in singulos annos vel menses certam pecuniam stipulati fuerimus: nam finitis quibusdam annis aut mensibus, huius quidem temporis pecuniam praestari oportet, futurorum autem annorum sane quidem obligatio contracta intelligitur, praestatio vero adhuc nulla est. si ergo velimus id quidem quod praestari oportet petere et in iudicium deducere, futuram vero obligationis praestationem in incerto relinquere, necesse est ut cum hac praescriptione agamus: EA RES AGATUR CUIUS REI DILS FUIT. alioquin si sine hac praescrip-

to be extended in some cases even beyond what we have specified.

130. Now let us consider the subject of the *praescriptiones* which are employed for the benefit of the plaintiff<sup>1</sup>. 131. For it often happens that in consequence of one and the same obligation there is something to be paid or done at once and something at a future time. For instance, when we have stipulated for the payment of a certain sum of money every year or every month: for then on the termination of each year or month, there is a present obligation that the money for that period shall be paid, whilst as to the future years an obligation is held to be contracted, but as yet there is no necessity for payment. If, therefore, we wish to sue for the sum actually due and to lay the matter before a *iudex*, leaving the future discharge of the obligation in uncertainty, we must commence our action with this praescription: "Let that amount which is already due be the matter of suit." Otherwise, if we have proceeded without this praescription, that is, by the formula

<sup>1</sup> "Omnis autem in quaerendo... oratio praescribere primum debet (ut quibusdam in formulis, *Ea res agatur*) ut inter quos disseritur conveniat, quid sit id de quo disseratur." Cic. *de Fin.* II. 1.

In *De Orat.* I. 37, Cicero ridicules a lawyer who had claimed the

benefit of a *praescriptio* for his client, the defendant in a suit. Cicero calls it indeed an *exceptio*, but it is evident that he uses the term as synonymous with *praescriptio*, for he gives the wording "*cujus pecuniae dies fuisset*," a well-known praescriptive form.



tione egerimus, ea scilicet formula qua incertum petimus, *cuius intentio* his verbis concepta est: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTERE, totam obligationem, id est etiam futuram in hoc iudicium deducimus, et quantumvis in obligatione fuerit, tamen id solum consequimur, quod *litis contestatae* tempore praestari oportet, ideoque removemur postea agere volentes. item si verbi gratia ex empto agamus, ut nobis fundus mancipio detur, debemus ita praescribere: EA RES AGATUR DE FUNDO MANCIPANDO: ut postea, si velimus vacuam possessionem nobis tradi, de tradenda ea vel ex stipulatu vel ex empto agere possimus. nam si non praescribimus, totius illius iuris obligatio illa incerta actione: QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET, per *litis contestationem* consumitur, ut postea nobis agere volentibus de vacua possessione tradenda nulla supersit actio. (132.) Praescriptiones autem appellatas esse ab eo, quod ante formulas praescribuntur, plus quam manifestum est.

through which we sue for an uncertain sum, and the *intentio* of which runs: "Whatever it appears that Numerius Negidius ought to give or do to Aulus Agerius;" in such case we have included in this reference to a *iudex* the whole obligation, i.e. even the future part of it; and whatever be the amount it deals with, we can only obtain that portion which was due at the time of the *litis contestatio*, and therefore we are estopped if we wish to bring another action afterwards. Suppose again, as another example, that we bring a suit on a purchase, for the purpose of having an estate transferred to us by mancipation; we ought to prefix this praescription: "Let the question before the court be the transfer of the land by mancipation;" so that if we subsequently desire to have the possession vacated and transferred to us, we may be able to sue for delivery either upon a stipulation or upon a purchase. For if we do not so praescribe, the binding force of the whole engagement is destroyed by the *litis contestatio* in the uncertain action: "Whatever Numerius Negidius ought to give or do to Aulus Agerius;" so that if we subsequently desire to bring an action for the vacation and delivery of the possession, no action will lie for us. 132. That praescriptions have their name from the fact of their being prefixed to formulae is more than evident.

133. Sed *his* quidem temporibus, sicut supra quoque *indicavimus*, omnes praescriptiones ab actore proficiscuntur. olim autem quaedam et pro reo opponebantur. qualis illa erat praescriptio: *EA RES AGATUR: SI IN EA RE PRAEJUDICIUM HEREDITATI NON FIAT: quae* nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditatis alio genere iudicii praerudicium *hereditati* faciat, velut cum *res singulas petat*; esset enim iniquum per unius *partis petitionem* maiori quaestioni de *ipsa hereditate praerudicari*. quare etiam *his temporibus ei, unde petitur, exceptio hanc in rem comparatur* ..... (134.) *Ab actore autem vel nunc praescriptiones quaedam speciales praeter eas quas supra enumeravimus adhibenda sunt* ..... *si v. gr. dominus servi alicuius ex stipulatione eius agere velit, in qua et praesentes et futurae obligationes ex pacto insunt, forte si ita convenis-*

133. At the present day, as we have also stated above<sup>1</sup>, all praescriptions proceed from the plaintiff, but in olden times some of them were set up by the defendant. Such was the praescription which ran thus: "Let this be the question tried: provided only that there be thereby no prior decision as to the inheritance:" but this is now thrown into the form of an exception, and is resorted to when the claimant of an inheritance takes in some other way proceedings which affect the question of inheritance, for instance, when he brings a suit for individual portions of it; for it would be unfair<sup>2</sup> [to allow the more important question as to the inheritance itself to be prejudged by the petitory suit<sup>3</sup> for a particular part thereof. And therefore even now-a-days an exception is provided to this end for the benefit of him from whom the inheritance is claimed..... 134. On the plaintiff's side, too, there are even at the present day several special praescriptions employed in addition to those we have named above.....thus when the owner of some slave is desirous of bringing an action upon the slave's stipulation, wherein are contained by virtue of an agreement payments both present and future, the

<sup>1</sup> IV. 130.

<sup>2</sup> The whole of the passage in brackets is translated from Heffter's conjectural reading, given in the text above. This has been suggested

to Heffter by various passages in the Digest, viz. D. 44. 1. 21, D. 5. 1. 54, D. 12. 1. 40 and D. 45. 1. 126. 2.

<sup>3</sup> IV. 92.

*set, ut ex pecunia quae in stipulatum deducta est menstrua V HS. refunderentur: intentioni actoris loco demonstrationis ita praescribendum est: ea res agatur quod Chrysogonus Lucii Seii servus actor de Numerio Negidio tricies HS. stipulatus est convenitque inter eos, ut ex ea pecunia menstrua V HS. refunderentur cuius rei dies fuit. Deinde intentione formulae determinatur is cui dari oportet; et sane domino dari oportet quod servus stipulatur. at in praescriptione de pacto quaeritur quod secundum naturalem significationem verum esse debet. (135.) Quaecumque autem diximus de servis, eadem de ceteris quoque personis quae nostro iuri subiectae sunt dicta intelligemus. (136.) Item admonendi sumus, si cum ipso agamus qui incertum promiserit,*

arrangement having been, for example, that out of the money forming the subject of the stipulation five *sestertia* should be repaid monthly; a praescription ought to be inserted prior to the plaintiff's *intentio* and in the place of a *demonstratio*, to this effect: "Let this be the matter of suit, viz. that since the plaintiff, Chrysogonus, the slave of Lucius Titius, stipulated for 300 *sestertia* to be paid him by Numerius Negidius, and an agreement was entered into between them that out of that money five *sestertia* should be repaid monthly, which instalment is now due." Then in the *intentio*] of the formula the person is specified to whom the payment ought to be made: and obviously it is the master to whom the subject of the slave's stipulation ought to be given. But it is in the praescription that the question as to the pact<sup>1</sup> is raised, which pact ought to be truly described<sup>2</sup> according to its obvious sense. 135. All that we have said about slaves we shall understand to apply also to other persons who are subject to our authority. 136. We must also be reminded that if we sue the very person who has promised us a thing of un-

<sup>1</sup> Sc. the pact regarding the monthly payments. This was regarded as forming an element of the stipulation, as it was made at the same time, for "pacta incontinenti facta stipulationibus inesse creduntur." D. 12. 1. 40.

<sup>2</sup> This is Heffter's explanation of *verum*: see his note *ad locum*. In the praescription, therefore, what

really took place between the stipulating parties is to be described, and the name of the slave to be given. This transaction having been examined and its real nature established, the owner of the slave is thereupon in a position to claim the money as plaintiff, for as soon as his slave's claim has been made out, he has the benefit of it.

ita nobis formulam esse propositam, ut praescriptio inserta sit formulae loco demonstrationis, hoc modo: IUDEX ESTO. QUOD AULUS AGERIUS DE NUMERIO NEGIDIO INCERTUM STIPULATUS EST, MODO CUIUS REI DIES FUT, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET et reliqua. (137.) Si cum sponsore aut fideiussore agatur, praescribi solet in persona quidem sponsoris hoc modo: EA RES AGATUR. QUOD AULUS AGERIUS DE LUCIO TITIO INCERTUM STIPULATUS EST, QUO NOMINE NUMERIUS NEGIDIUS SPONSOR EST, CUIUS REI DIES FUT; in persona vero fideiussoris: EA RES AGATUR. QUOD NUMERIUS NEGIDIUS PRO LUCIO TITIO INCERTUM FIDE SUA ESSE IUSSIT, CUIUS REI DIES FUT; deinde formula subicitur.

138. Superest ut de interdictis dispiciamus. (139.) Certis igitur ex causis Praetor aut Proconsul principaliter auctoritatem suam finiendis controversiis *interponit*. quod tum maxime facit,

certain value, our formula is so set forth that in it a prescription takes the place of the *demonstratio*, thus: "Let there be a *iudex*. Inasmuch as Aulus Agerius stipulated for something uncertain from Numerius Negidius; whatever in respect thereof, but only in respect of that part which is already due, Numerius Negidius ought to give or do to Aulus Agerius, &c." 137. If an action be brought against a *sponsor* or *fidejussor*<sup>1</sup>, there is usually in the case of a *sponsor* a praescription in this form: "Let this be the subject of the action. Inasmuch as Aulus Agerius stipulated for something uncertain from Lucius Titius, in respect whereof Numerius Negidius was *sponsor*; whatever amount be now due, &c.;" and in the case of a *fidejussor*: "Let this be the subject of the action. Inasmuch as Numerius Negidius became *fidejussor* for Lucius Titius; whatever amount be now due, &c." Then follows the formula.

138. We now have to discuss the subject of interdicts. 139. In certain cases then the Praetor or Proconsul interposes his authority at the outset to bring disputes to a conclusion: and this he does more particularly in suits about

cum de possessione aut quasi possessione inter aliquos contenditur. et in summa aut iubet aliquid fieri, aut fieri prohibet. formulae autem verborum et conceptiones quibus in ea re utitur interdicta *decretave* vocantur. (140.) *Vocantur* autem decreta cum fieri aliquid iubet, velut cum praecipit, ut aliquid exhibeatur aut restituatur: interdicta vero cum prohibet fieri, velut cum praecipit: ne sine vitio possidenti vis fiat, neve in loco sacro aliquid fiat. unde omnia interdicta aut restitutoria aut exhibitoria aut prohibitoria vocantur. (141.) Nec tamen cum quid iusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad iudicem recuperatoresve *itur*, et ibi editis formulis quaeritur, an aliquid adversus Praetoris edictum factum sit, vel an factum non sit quod is fieri iusserit.

possession or quasi-possession<sup>1</sup>, summarily ordering something to be done or forbidding it to be done. The forms of words which he employs for this purpose we call interdicts or decrees. 140. They are called decrees when he orders something to be done, as when he directs that a thing shall be produced in court or be delivered up. They are called interdicts when he prohibits a thing being done, for instance, when he directs "that no violence be done to one who is in possession innocently", or that something be not done on sacred ground." Hence all interdicts<sup>2</sup> are named either restitutory, exhibitory, or prohibitory. 141. The matter is not, however, at once concluded when the Praetor has commanded or forbidden the doing of something, but the parties go before a *iudex* or before *recuperatores*, and there, upon the issuing of formulae, investigation is made whether anything has been done contrary to the Praetor's edict<sup>3</sup> or whether

<sup>1</sup> For quasi possession see Savigny, *On Possession* (Perry's translation), pp. 130—134.

<sup>2</sup> *Sine vitio* = *neque vi*, *neque precario*. See Savigny, *On Poss.*, pp. 66, 355.

<sup>3</sup> Interdict is here used as a general term, including decrees also, for exhibitory and restitutory orders are plainly of the latter character. So also Justinian says in *Inst.* IV. 15. 1,

<sup>4</sup> That is to say, against the

*tum perpetuum*, or annual edict, published by every Praetor on commencing his duties. Therefore no one was guilty of acting contrary to an interdict unless that interdict was in accordance with the terms of the annual edict, and this is the meaning of D. 50. 17. 102. pr. The interdict was issued on an *ex parte* statement, and therefore there was a possibility that the Praetor had been misled by false representations as to the facts of the case.

et modo cum poena agitur, modo sine poena: cum poena, velut cum per sponsionem agitur; sine poena, velut cum *arbitr* ter petitur. et quidem ex prohibitoriis interdictis semper per sponsionem agi solet, ex restitutoriis vero vel exhibitoriis modo per sponsionem, modo per formulam agitur quae arbitraria vocatur.

142. Principalis igitur divisio in eo est, quod aut prohibitoria sunt interdicta, aut restitutoria, aut exhibitoria. (143.) Sequens in eo est divisio, quod vel adipiscendae possessionis causa comparata sunt, vel retinendae, vel recipiendae.

144. Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, cuius principium est QUORUM BONORUM: eiusque vis et potestas haec est, ut quod quisque ex his bonis quorum possessio alicui data est pro herede aut pro possessore possideret, id ei cui bonorum possessio data est restituatur. pro herede autem possidere videtur tam is qui heres

anything has not been done which he ordered to be done. And sometimes a penalty accompanies the action, sometimes it does not: there is a penalty attached, for instance, when the proceedings are by *sponsio*; there is no penalty, for instance, when an *arbiter*<sup>1</sup> is demanded. In prohibitory interdicts the course of proceeding is always by *sponsio*, in restitutory or exhibitory interdicts sometimes by *sponsio*, sometimes by the formula called *arbitraria*.

142. Of interdicts then the primary division is that they are either prohibitory, restitutory, or exhibitory. 143. There is another division based on the fact that they are provided either for the purpose of obtaining, retaining, or recovering possession.

144. An interdict for the purpose of obtaining possession, the first words of which are "*Quorum bonorum*," is provided for the *bonorum possessor*<sup>2</sup>: its force and effect being that whatever anyone possesses *pro herede* or *pro possessore* out of the goods of which the possession has been given to another, is to be delivered up to that person to whom the possession of the goods has been given. Now not only the heir, but also

<sup>1</sup> Cf. Cic. *pro Tull.* §3 and Justinian, *Inst.* IV. 6. 31, with Sandars's notes upon the passage.

<sup>2</sup> III. 34. The words of the interdict are given in full in D. 43. 1. 1. pr.

est, quam is qui putat se heredem esse : pro possessore is possidet qui sine causa aliquam rem hereditariam vel etiam totam hereditatem, sciens ad se non pertinere, possidet. ideo autem adipiscendae possessionis vocatur, quia ei tantum utile est qui nunc primum conatur adipisci rei possessionem : itaque si quis adeptus possessionem amiserit, desinit ei id interdictum utile esse. (145.) Bonorum quoque emptori similiter proponitur interdictum, quod quidam possessorium vocant. (146.) Item ei qui publica bona emerit, eiusdem condicionis interdictum proponitur, quod appellatur sectorium, quod sectores vocantur qui publice bona mercantur. (147.) Interdictum quoque quod appellatur Salvianum adipiscendae possessionis comparatum est,

any one who thinks himself heir, is held to possess *pro herede*: whilst a possessor *pro possessore* is anyone who possesses without title any item of the inheritance or the whole inheritance, knowing that he has no claim to it. The interdict is styled *adipiscendae possessionis*, because it is only available for a man who is now for the first time endeavouring to obtain possession of a thing<sup>1</sup>; and therefore if after obtaining possession he lose it again, the interdict ceases to be of service to him. 145. So too, an interdict is set forth in the edict for the benefit of a *bonorum emptor*<sup>2</sup>, which some call by the name *interdictum possessorium*<sup>3</sup>. 146. So too, an interdict of like character is set forth for the benefit of a purchaser of public property, to which the name *interdictum sectorium* is given, because those who buy property sold for the good of the state are called *sectores*<sup>4</sup>. 147. The interdict also which is called *Salvianum* is provided for the purpose of obtaining

<sup>1</sup> Hence "restituatur" a few lines above does not mean to restore, but to deliver up, a sense in which the word has been frequently used before, e. g. in II. 248—258, passim.

<sup>2</sup> III. 80.

<sup>3</sup> No trace of this interdict is to be found in the sources: probably because the later and more general interdict, "Ne vis fiat ei qui in possessionem missus erit," D. 43. 4, was found to be a sufficient protection for *bonorum emptores*, and so the other fell into disuse.

asserts that the old interdict, as well as that termed *sectorium*, was framed upon the interdict *quorum bonorum*.

<sup>4</sup> See Pseudo-Asconius on Cic. *in Verr.* II. 1. 52 and II. 1. 61. Festus says: "Sectores et qui secant dicuntur, et qui emta sua persequuntur." In 2 *Phil.* 26, Cicero calls Antony "Pompeii sector," and in § 29 of the same oration speaks of money "quam pro sectione debebas." For further information see Heineccius, *1. Rom.* p.



eoque utitur dominus fundi de rebus coloni quas is pro mercedibus fundi pignori futuras pepigisset.

148. Retinendae possessionis causa solet interdictum reddi, cum ab utraque parte de proprietate alicuius rei controversia est, et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat, cuius rei gratia comparata sunt UTI POSSIDETIS et UTRUBI. (149.) Et quidem UTI POSSIDETIS interdictum de fundi vel aedium possessione redditur, UTRUBI vero de rerum mobilium possessione. (150.) Et si quidem de fundo vel aedibus interdicatur, eum potiolem esse Praetor iubet qui eo tempore quo interdictum redditur nec vi nec clam nec precario ab adversario possideat; si vero de re mobili, *tunc* eum potiolem esse iubet qui maiore parte eius anni nec vi nec clam nec precario ab adversario possidet: idque satis ipsis verbis

possession, and the owner of land employs it with reference to the property of his tenant which the latter has pledged for the rent of his farm.

148. An interdict for the purpose of retaining possession is usually granted when two litigants both lay claim to the ownership of a particular thing, and the first question for decision is, which of them ought to be possessor and which plaintiff; to this end the interdicts *uti possidetis* and *utrubi* are provided<sup>1</sup>. 149. The interdict *uti possidetis* is granted for the possession of land or a house, the interdict *utrubi* for the possession of moveables. 150. And if the interdict be granted for land or a house, the Praetor orders that he is to be preferred who at the time of the grant of the interdict is in possession, provided it be without violence, clandestinity, or sufferance<sup>2</sup> on the part of his opponent. This is fully

<sup>1</sup> A full account of these interdicts is to be found in Savigny's *Treatise on Possession* (Perry's translation), Book IV. §§ 40, 41. also D. 43. 17, D. 43. 31.

<sup>2</sup> *Precarium* is thus defined Savigny (*On Poss.* p. 355). 'ever permits another to enjoy property (*i. e.* to enjoy natural possession,) or to enjoy an easement, retains to himself the right of recalling per-

mission at will, and the juridical relation arising from the transaction is called *precarium*.' This name had its origin in the fact of the permission itself being usually obtained by a *prayer*; this prayer, however, is not essential, and even a tacit permission is sufficient.

Paulus says: "*Precario possidere videtur non tantum qui per epi- vel quacunque alia ratione*

interdictorum significatur. (151.) *At* in UTRUBI interdicto non solum sua cuique possessio prodest, sed etiam alterius quam iustum est ei accedere, velut eius cui heres extiterit, eiusque a quo emerit vel ex donatione aut dotis datione acceperit. itaque si nostrae possessioni iuncta alterius iusta possessio exsuperat adversarii possessionem, nos eo interdicto vincimus. nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest; nam ei quod nullum est nihil accedere potest. sed et si vitiosam habeat possessionem, id est aut vi aut clam aut precario ab adversario adquisitam, non datur; nam ei possessio sua nihil prodest. (152.) Annus autem retrorsus numeratur. itaque si tu verbi gratia anni mensibus possederis prioribus v, et ego vii posterioribus, ego potior ero quantitate mensium possessionis; nec tibi in hoc interdicto

stated in the actual wording of the interdict<sup>1</sup>. 151. But in the interdict *utrubi* a person is not only profited by his own possession, but also by that of any other person which lawfully accrues to him, for instance by that of one whose heir he is, or that of one from whom he has bought the thing or received it as a gift or an assignment of *dos*. If therefore the good possession which belonged to another when joined to our possession exceed the possession of our opponent, we succeed upon this interdict. But no accession of time is allowed or can be allowed to a man who has no possession of his own: for to that which is a nullity nothing can be added. And further, if he have a tainted possession, i.e. one acquired by violence, clandestinity, or sufferance on the part of his opponent, no accession is allowed: for his own possession does not count for him. 152. The year is reckoned backwards; therefore if you, for example, have been in possession for the first five months of the year, and I for the last seven, I shall be in the better position by the amount of the months of my possession<sup>2</sup>; nor will it be of service to

hoc sibi concedi postulavit, sed et is qui nullo voluntatis indicio, patiente tamen domino possidet." *S. R. v. 6. 11.* See also *D. 43. 16. 1.*

<sup>1</sup> The interdict is given in full in *D. 43. 17. 1.*

<sup>2</sup> Instead of the words "quantitate.... possessio est,"

Heffter reads "quaehbet vero plurium mensium possessionis causa tibi in hoc interdicto equiparabit anni possessionem:" i. e. a man is understood to have had possession for the major part of the year, who has had

quod *prior tua eius anni possessio est.* (153.) Possidere autem videmur non solum si ipsi possideamus, sed etiam si nostro nomine aliquis in possessionem sit, licet is nostro iuri subiectus non sit, qualis est colonus et inquilinus. per eos quoque apud quos deposuerimus, aut quibus commodaverimus, aut quibus gratuitam habitationem constituerimus, ipsi possidere videmur. et hoc est quod volgo dicitur, retineri possessionem posse per quemlibet qui nostro nomine sit in possessione. quinetiam plerique putant animo quoque retineri possessionem, quod nostrorum praeceptorum sententia est. Diversae autem scholae auctoribus contrarium placet, ut animo solo, quamvis voluerimus ad rem reverti, tamen retinere possessionem non videamur. apisci vero

you as regards this interdict, that your possession was earlier in the year. 153. We are regarded as possessors not only when we possess personally, but also when any other is in possession in our name<sup>1</sup>, even though he be not subject to our authority, as a tenant of land or of a house. We are also considered to possess by means of those with whom we have deposited or to whom we have lent anything, or to whom we have given a right of habitation gratuitously. And this is the meaning of the common saying "that possession can be retained by means of any one who is in possession in our name." Moreover many lawyers think that possession can be retained by mere will, and this is the opinion of our authorities. The authorities of the other school uphold the opposite view, that even though we have the wish to return to the thing, yet we are not to be regarded as retaining possession by mere will<sup>2</sup>. Now who those persons are by whom we

session only for two months, provided the opponent's possession, which has continued for the residue of the year, be *ritiosa*, and so not to be reckoned; see D. 50. 16. 156, D. 43. 31. 1.

<sup>1</sup> *Esse in possessione* does not mean the same as *possidere*, the former expression denoting the mere fact of detention, the latter that the detention is protected by means of interdicts; hence a tenant is "in possession," whereas his landlord "possesses." See Savigny *On*

translated by Perry, Bk. 1. § 7.

<sup>2</sup> Savigny holds that possession is acquired by a conjunction of these elements, (1) the physical power of dealing with a thing and of preventing others doing so, (2) a knowledge that we have this power, (3) an intent to use it as owners of the thing and not for another's benefit. If we hold the thing with the intent of giving the ownership to another, that other acquires through us a derivative possession and we have merely detention. The first two

*Interdicta recuperandae possessionis.*

*possessionem per quos possimus, secundo commentario rettulimus; nec ulla dubitatio est, quin animo possessionem apisci non possimus.*

154. Recuperandae possessionis causa solet interdictum dari, si quis vi deiectus sit. nam ei proponitur interdictum cuius principium est: UNDE TU ILLUM VI DEIECISTI. per quod is qui deiecit cogitur ei restituere rei possessionem, si modo is qui deiectus est nec vi nec *clam* nec precario possidet ab adver-

acquire possession we have stated in the second commentary<sup>1</sup>: and there is no doubt that we cannot acquire possession by mere will<sup>2</sup>.

154. An interdict for recovering possession is generally granted when a man has been forcibly ejected. For there is set forth for his benefit the interdict which commences with the words: "*Unde tu illum vi deiecisti*:" by means of which the ejector is compelled to restore the possession of the thing, provided only he who was ejected did not get the possession from his adversary<sup>4</sup> by violence, clandestinity, or sufferance:

elements make up the *factum*, the latter is the *animus*.

Possession, he says, is retained by the same conjunction of *animus* and *factum*, but neither need be so strongly developed as for acquisition. There need not be an active will to hold the thing, but the mere absence of a will to cease to hold it is enough; and the *factum* is not the absolute power to deal with the thing, but the ability to reproduce that power at will, coupled with a knowledge that we have such power of reproduction. See Savigny's *Treatise on* translated by Perry, passim. The reading of this passage which Heffter suggests agrees with Savigny's view. His reading is: "Unde etiam placuit ut quoniam possidemus animo solo, quando voluerimus reversuri abire, retinere possessionem videamur."

<sup>1</sup> II. 89, 94.

<sup>2</sup> Although we can retain possession by merely having the power of reproduction of the original *factum*, which Gaius calls "by mere will,"

*animo solo*; yet to acquire possession, the *factum*, as stated in the note above, must be of a much more marked character, viz. an *actual* power of dealing.

<sup>3</sup> This is fully explained in Savigny's *Treatise*, Bk. IV. § 42; where the amount of violence necessary to found a claim for its benefit, and the question of self-redress are also entered into.

The interdict ran on "id illi restituas," i. e. "Restore to him that from which you have ejected him."

<sup>4</sup> There is another reading *versus alterum*, and if we adopt it, the passage will run: "provided the person ejected did not get possession as against the other by force, clandestinity, or sufferance." There is much to be said for this reading, for it is a well-known principle that the possessor was not liable under the interdict, if his wrongful dealing had been directed against a person different from the applicant for the same.

*sario*: quod si aut vi aut clam aut precario possederit, *unde vi* deicitur. (155.) Interdum tamen *etiam ei quem vi deiecit* quamvis *a me aut vi aut clam aut precario possideret*, cogar rei restituere possessionem, velut si armis vi eum deiecerim: nam Praetor [*desunt 4 lin.*].

156. Tertia divisio interdictorum in hoc est, quod aut simplicia sunt aut duplicia: (157.) simplicia velut in quibus alter actor, alter reus est: qualia sunt omnia restitutoria aut exhibitoria. nam actor est qui desiderat aut exhiberi aut restitui, reus is est a quo desideratur ut exhibeat aut restituat. (158.) Prohibitoriorum autem interdictorum alia duplicia, alia simplicia sunt. (159.) Simplicia sunt *veluti* quibus prohibet Praetor in loco sacro aut in flumine publico ripae eius aliquid facere

but if he did get the possession by violence, clandestinity, or sufferance, he is ejected with impunity<sup>1</sup>. 155. Sometimes, however, I should be compelled to restore possession of the thing to a person whom I had ejected, even though he had got the possession from me by violence, clandestinity, or sufferance, for instance, if I ejected him forcibly with arms<sup>2</sup>; for the Praetor<sup>3</sup>.....

156. A third division of interdicts is based on the fact that they are simple or double. 157. Those are simple, for instance, where one party is plaintiff and the other defendant: of which kind are all restitutory or exhibitory interdicts. For the plaintiff is he who requires that the thing be produced or restored, and the defendant is he at whose hands the production or restoration is required. 158. But of prohibitory interdicts some are double, some are simple. 159. Those are simple, for instance, in which the Praetor prohibits the defendant from doing something in a sacred place, or in a public river, or on its bank: for here the plaintiff is he who

<sup>1</sup> See Savigny's *Treatise*, p. 331. The possessor who was ejected by any of the three modes named, could immediately repossess himself, and his original possession was considered by the law to have never been disturbed. See Paulus, *S. R.* v. 6. 7.

<sup>2</sup> See Savigny's *Treatise*, p. 344. Cic. *pro Tullio*, c. 44, Cic. *pro C.* 32.

<sup>3</sup> It is not improbable, as Heffter suggests, that Gaius in this lost part is speaking of the interdict *unde vi* being employed against the heirs of the wrong-doer. The word *heredes* does appear in the lacuna, and the fact that the heirs were liable is stated in D. 43. 16. 1. 48, D. 43. 16. 3. pr., D. 43. 16. 3. 18.

*reum*: nam actor est qui desiderat ne quid fiat, reus is qui aliquid facere conatur. (160.) Duplicia sunt, velut *UTI POSSIDETIS* interdictum et *UTRUBI*. ideo autem duplicia vocantur, quia par utriusque litigatoris in his condicio est, nec quisquam praecipue reus vel actor intelligitur, sed unusquisque tam rei quam actoris partes sustinet: quippe Praetor pari sermone cum utroque loquitur. nam summa conceptio eorum interdictorum haec est: *UTI NUNC POSSIDETIS, QUOMINUS ITA POSSIDEATIS VIM FIERI VETO*. item alterius: *UTRUBI HIC HOMO DE QUO AGITUR, APUD QUEM MAIORE PARTE HUIUS ANNI FUIT, QUOMINUS IS EUM DUCAT VIM FIERI VETO*.

161. Expositis generibus interdictorum sequitur ut de ordine et de exitu eorum dispiciamus; et incipiamus a simplicibus. (162.) Si igitur restitutorium vel exhibitorium interdictum redditur, velut ut restituatur ei possessio qui vi deiectus est, aut exhibeatur libertus cui patronus operas indicere vellet, modo

desires that the thing be not done, and the defendant is he who attempts to do it. 160. The double are such as the interdicts *Uti possidetis* and *Utrubi*: which are called "double" from the fact that the position of each litigant in respect of them is the same, and that neither is regarded as being specially defendant or plaintiff, but each sustains the character of defendant and plaintiff at once, inasmuch as the Praetor addresses both in like language. For the general drawing of these interdicts is as follows: "I forbid violence to be employed to prevent you from possessing in the manner you now possess." So also in the case of the other interdict: "I forbid violence to be employed to prevent that man, whether of the two he be, with whom the slave who is the matter of action has been during the greater part of this year, from taking possession of him."

161. Having now explained the different kinds of interdicts, our next task is to consider their process and result: and let us begin with the simple interdicts. 162. If then a restitutory or exhibitory interdict be granted, for instance, that possession shall be restored to one who has been forcibly ejected, or that a *libertus* shall be produced<sup>1</sup> to whom his patron wishes to appoint his services, the matter is brought

<sup>1</sup> Sc. by means of a special interdict, "*de libero homine exhibendo*," which, like our writ of Habeas Cor-

pus, was a process for bringing up the body of a freeman who was under detention. "The special object of

sine periculo res ad exitum perducitur, modo cum periculo. (163.) namque si arbitrum postulaverit is cum quo agitur, accipit formulam quae appellatur *arbitraria*. nam iudicis arbitrio si quid restitui vel exhiberi debeat, id sine *poena* exhibet vel restituit, et ita absolvitur: quod si nec restituat neque exhibeat, quanti ea res est condemnatur. sed actor quoque sine *poena* experitur cum eo quem neque exhibere neque restituere quicquam oportet, nisi calumniae iudicium ei oppositum fuerit. diversae quidem scholae auctoribus placet prohibendum calumniae iudicio cum qui arbitrum postulaverit, quasi hoc ipso confessus videatur, restituere se vel exhibere debere. sed alio iure utimur, et recte: namque sine ullo timore ne superetur, arbitrum quisque postulare potest. (164.) Ceterum observare debet is qui vult arbitrum petere, ut statim petat, antequam ex iure exeat, id est antequam a Praetore discedat: sero enim petentibus non indulgebatur. (165.) Itaque si arbitrum non petierit, sed

to a result sometimes without risk, sometimes with risk. 163. For if the defendant have demanded an *arbiter*, he receives the formula of the kind called *arbitraria*; and then, if by the award of the *iudex* he be bound to restore or produce something, he restores or produces it without any penalty, and so is freed from liability: but if he do not restore or produce it, he is condemned to pay its value. The plaintiff, too, takes proceedings against a man who is not under obligation to produce or restore anything without making himself liable to any penalty, unless a suit for *calumnia*<sup>1</sup> be instituted against him. The authorities of the opposite school think, however, that a defendant who has demanded an *arbiter* is barred from instituting a suit for *calumnia*, since by the very fact (of demanding an *arbiter*) he seems to have made admission that he ought to restore or produce something<sup>2</sup>. But we very properly follow the other rule, for a man may demand an *arbiter* without being under any apprehension of losing his case. 164. He who wishes to demand an *arbiter*, ought to be careful to do so before going out of court, that is, before he leaves the Praetor's presence<sup>3</sup>; for if people make the demand at a later stage, it will not be granted. 165. Hence,

the interdict," says Ulpian, "was to defend liberty and to prevent free men from being held in restraint;" but it answered the purpose specified in the text also. D. 43. 29. 1.

<sup>1</sup> IV. 174, 175.

<sup>2</sup> The argument resembles that in IV. 114.

<sup>3</sup> A similar warning is given in IV. 29.



*tacitus de iure exierit, cum periculo res ad exitum perducitur. nam actor provocat adversarium sponsione: Ni contra edictum Praetoris non exhibuerit aut non restituerit: ille autem adversus sponsionem adversarii restipulatur. deinde actor quidem sponsionis formulam edit adversario; ille huic invicem restipulationis. sed actor sponsionis formulae subicit et aliud iudicium de re restituenda vel exhibenda, ut si sponsione vicerit, nisi ei res exhibeatur aut restituatur adversarius quanti ea res sit condemnetur—[desunt 48 lineae].*

166. *Postquam igitur Praetor interdictum reddidit, primum litigatorum alterutrius res ab eo fructum licitando rei tantisper in possessione constituitur, si modo adversario suo fructuaria stipu-*

if the defendant do not ask for an *arbiter*, but go out of court without speaking, the matter is carried on to its issue "with risk." For the plaintiff challenges his opponent with a spon- sion: "Unless he have not failed to produce or restore in violation of the Praetor's edict:" and the latter again makes a restipulation in reply to his adversary's spon- sion. Then the plaintiff serves his opponent with a formula in claim of his spon- sion; and the defendant in his turn serves the other with a formula in claim of his restipulation. But the plaintiff tacks on to the formula in claim of the spon- sion another precept for an issue to decide on the obligation (of the defendant) to restore or produce, so that if he succeed in his spon- sion, and the thing be not produced or restored, [his opponent shall be condemned for the value of the thing]<sup>1</sup>.

166. Now after the Praetor has granted an interdict, first of all the matter in dispute is put for the interim into the possession of one or other of the litigants according to the

<sup>1</sup> Hollweg suggests the reading which we have translated within the brackets: it is obvious that the sentence must have ended in some such manner.

It will be observed that the proceedings are identical with those described in IV. 93, the *sponsio* being in both cases prejudicial only and intended to lead up to a decision on the stipulation, *pro praede litis et* in the one case, *de re* in the other,

which stipulations were tacked on to the sponsions and really contained the gist of the case.

Hence in his *Treatise on Possession* (Book IV. § 36), Savigny says that unless the defendant on an interdict admitted the plaintiff's demand, the process on the interdict became identical with that in an ordinary action.

See Cic. *pro Caecina*, 8, *pro Tull.* 53.

*satisfat, cuius potestas haec est, ut si contra ipsum esset postea pronuntiatum, fructus duplum praestet. nam inter adversarios qui Praetore auctore certant, dum contentio fructus licitationis est, scilicet quia possessorem interim esse interest, rei possessionem ei Praetor vendit, qui plus licetur. postea alter alterum sponsione provocat: NISI ADVERSUS EDICTUM PRAETORIS POSIDENTIBUS NOBIS ITS FACTA ESSET. invicem ambo restipulantur adversus sponsionem vel [4 lineae]. — iudex aput quem de ea re agitur illud scilicet requirit quod Praetor interdicto complexus est, id est uter eorum cum fundum easve aedes per id tempus quo interdictum redditur nec vi nec clam nec precario possideret. cum iudex id exploraverit, et forte secun-*

result of their bidding for the grant of the fruits by the Praetor, provided only the successful bidder gives security to his opponent by the "fructuary stipulation," the force and effect of which is, that if the decision subsequently go against him, he pays twice the value of the fruits<sup>1</sup>. For since there is a rivalry between the litigants who are contending one against the other with the Praetor's sanction, because it is an advantage to be interim-possessor, therefore the Praetor sells the possession of the subject to the one who makes the highest bid for it. After this one of them challenges the other with a sponsion running thus: "Unless violence has been done to us contrary to the Praetor's edict whilst we were in possession. Both in their turn restipulate against the sponsion.....".....the *iudex* before whom the suit on the subject is conducted proceeds of course to investigate the point which the Praetor dealt with in his interdict, viz. which of the parties was in possession of the land or house at the time when the interdict was granted, holding such possession without violence, clandestinity, or sufferance<sup>2</sup>. When the *iudex* has investigated this point, and his decision has been, we will suppose, in my favour,

<sup>1</sup> The text adopted here is that of Huschke. Heffter's varies considerably from it verbally, but only slightly in sense: the chief difference being that, instead of *fructus duplum*

Heffter suggests *possessio* ; and inclines to translate

as in the earlier part of the passage "from his opponent," not "from

the Praetor." For *tantisper* in the sense of *interim* see D. 9. 3. 1. 9, D. 37. 10. 3. 13, and Gaius, 1. 188.

<sup>2</sup> This paragraph is corrupt, and none of the conjectures made by the editors of the text seem happy enough to merit insertion.

<sup>3</sup> IV. 150.

dum me iudicatum sit, adversarium *quidem* et sponsionis et restipulationis summas quas cum eo feci condemnat, et convenienter me sponsionis et restipulationis quae mecum factae sunt absolvit. et hoc amplius si aput adversarium meum *possessio est*, quia is fructus licitatione vicit, nisi restituat mihi possessionem, Cascelliano sive secutorio iudicio condemnatur. (167.) Ergo is qui fructus licitatione vicit, si non probat ad se pertinere possessionem, sponsionis et restipulationis et fructus licitationis summam poenae nomine solvere *et* praeterea possessionem restituere iubetur: et hoc amplius fructus quos *interea* percepit reddit. summa enim fructus licitationis non pretium est fructuum, sed poenae nomine solvitur, quod quis alienam possessionem per hoc tempus retinere et facultatem fruendi nascisci conatus est. (168.) Ille autem qui fructus licitatione victus est, si non probarit ad se pertinere possessionem, tantum sponsionis et restipulationis summam poenae nomine debet. (169.) Admonendi tamen sumus liberum esse ei qui fructus licitatione victus erit, omissa fructuaria stipulatione, sicut Cas-

he condemns my opponent to pay the amounts of the spon-  
sion and restipulation which I entered into with him, and  
consequently acquits me from the spon- sion and restipulation  
entered into with me. And besides this, if the (interim-) pos-  
session be with my opponent, because he beat me in the  
bidding for the fruits, he is condemned in a Cascellian or  
secutory action, unless he restore the possession to me. 167.  
Therefore the successful bidder for the fruits is ordered to pay  
the amount of the spon- sion and restipulation and of his bid  
for the fruits by way of penalty, besides restoring the posses-  
sion, in case he do not prove that the possession belongs to  
him: and further than this, he restores the fruits which he has  
enjoyed in the meanwhile. For the amount of the bid for  
the fruits is not the price of the fruits, but is paid by way of  
penalty for a man's attempting to retain during such (inter-  
mediate) time the possession and the power of enjoyment  
appertaining to another. 168. On the other hand, if he  
who has been beaten in the bidding for the fruits fail to prove  
that the possession belongs to him, he only owes by way of  
penalty the amount of the spon- sion and restipulation. 169.  
We must, however, bear in mind that he who is beaten in the  
bidding for the fruits is at liberty, even though no fructuary

celliano sive secutorio iudicio de possessione recuperanda  
ritur, ita *separatim* et de fructus licitatione agere: in quam  
proprium iudicium comparatum est, quod appellatur fructuarium,  
quo nomine actor *iudicatum soli* satis accipiet. dicitur autem  
et hoc iudicium secutorium, quod sequitur sponsionis victoriam;  
sed non aeque Cascellianum vocatur. (170.) Sed quia non-  
nulli interdicto reddito cetera ex interdicto facere volebant,  
atque ob id non poterat res expediri. Praetor — — — — —  
— comparavit interdicta [*desunt 47 lineae*].

171. Sed *adversus reos quidem infitantes ex quibusdam causis*  
*dupli actio constituitur*, velut si *iudicati* aut *depensi* aut *damni*  
*iniuriae* aut *legatorum per damnationem relictorum* nomine agitur:  
ex quibusdam causis sponsionem facere permittitur, velut de  
pecunia certa credita et pecunia constituta: sed certae qui-  
dem creditae pecuniae tertiae partis, constitutae vero pecu-

stipulation have been made, to proceed separately for the  
amount offered for the fruits, just as he can proceed separately  
for the recovery of the possession by the Cascellian or secutory  
action: and for this purpose a special form of proceeding has  
been provided, called *iudicium fructuarium*, by means of which  
the plaintiff can obtain security for the payment of the award  
of the *iudex*<sup>1</sup>. This action is called "secutory" as well as the  
other, because it follows upon success in the sponsion, but it  
is not properly called Cascellian also. 170. But inasmuch  
as some persons, after the interdict had been issued, refused  
to conform the rest of their conduct to the spirit of the inter-  
dict, and so matters could never be brought to a conclusion,  
therefore the Praetor... provided (other) interdicts.....

171. In some cases an action for double the value of the  
matter in dispute is allowed against defendants who deny their  
liability, as in the instance of the actions *iudicati*<sup>2</sup>, *depensi*<sup>3</sup>,  
*damni iniuriae*<sup>4</sup>, or for legacies left by damnation<sup>5</sup>: in some  
cases it is allowable to enter into a sponsion, as for example,  
in suing upon the loan of an ascertained sum<sup>6</sup>, or for an agreed  
amount<sup>7</sup>; but in the case of an ascertained loan the sponsion

<sup>1</sup> IV. 91.

<sup>2</sup> IV. 9, 21, 25.

<sup>3</sup> III. 127.

<sup>4</sup> III. 210, 216.

<sup>5</sup> II. 201—208, 282.

<sup>6</sup> III. 124.

<sup>7</sup> *Constitutum* was one of the *Pac-  
ta Praetoria*, mentioned in note (1)

### *Jusjurandum de calumnia.*

niae partis dimidia. (172.) Quodsi *neque sponsionis, neque dupli actionis* periculum ei cum quo agitur iniungatur, aut ne statim *quidem* ab initio pluris quam simpli sit actio, permittit Praetor iusiurandum exigere non calumniae causa infitias ire: unde quia heredes vel qui heredum loco habentur, numquam poenis obligati sunt, item feminis pupillisque *remitti solet poena* sponsionis, iubet modo eos *iurare*. (173.) statim autem ab initio pluris quam simpli actio est, velut furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli:

is allowed for a third part, in the case of an agreed amount it may be for a half. 172. But if the risk neither of a sponsion nor of an action for the double amount be cast upon the defendant, or if the action at starting be not for a larger amount than the simple sum demanded, the Praetor allows the exaction of an oath, "that the traverse is not pleaded vexatiously<sup>1</sup>:" hence, since heirs and those who are esteemed as heirs<sup>2</sup> are never liable to penalties<sup>3</sup>, and since the penalty of the sponsion is generally remitted in the case of females and minors, the Praetor orders such persons merely to take the oath. 173. Examples of actions which from their very outset are for more than the simple value of the thing in dispute are such as the action of *furtum manifestum* for four-fold, of *furtum nec-manifestum* for double, those of *furtum conceptum* and *oblatum* for three-fold<sup>4</sup>; for in these and some other cases

in the Appendix. It was a pact whereby a man entered into a new and special engagement to pay a debt already existing, and such debt might be either one owed by the man himself or by another person. A *constitutum* would render actionable a promise which previously was a mere *nudum pactum* not giving rise to an action, and the process provided for its recovery by the Praetorian edict was that named in the text, viz. the *actio constitutae pecuniae*. See Paul. S. R. II. 2.

<sup>1</sup> Paulus, S. R. II. 1, D. 10. 2. 44.

<sup>4</sup> From Cic. *pro Rosc. Amer.* c. 20 we learn that in earlier times the

penalty for falsely taking the oath *de calumnia*, was branding on the forehead with the letter K (for Kalumniat; and Heineccius thinks this penalty was inflicted whether the perjury took place in a civil or criminal action. See Heinecc. *Antiq.* IV. 16. 3.

<sup>2</sup> Sc. *Bonorum possessores*; II. 119 et seqq.

<sup>3</sup> Another reading is "jure civili non amplius obligati sint:" the meaning of which is the same as that of "poenis nunquam obligati sunt."

<sup>4</sup> III. 189—191.

## *Calumnia.*

nam ex his causis et aliis quibusdam, sive quis neget sive fateatur, pluris quam simpli est actio.

174. Actoris quoque calumnia coercetur modo calumniae iudicio, modo contrario, modo iureiurando, modo restipulatione. (175.) Et quidem calumniae iudicium adversus omnes actiones locum habet. et est decimae partis *causae*; adversus interdicta autem quartae partis *causae*. (176.) Liberum est illi cum quo agitur aut calumniae iudicium opponere, aut *iusiurandum* exigere non calumniae causa agere. (177.) Contrarium autem iudicium ex certis causis constituitur. velut si iniuriarum agatur, et si cum muliere eo nomine agatur, quod dicatur ventris nomine in possessionem missa dolo malo ad alium possessionem transtulisse; et si quis eo nomine agat, quod dicat se a Praetore in possessionem mis-

the action is for more than the simple value, whether the defendant traverse or admit the claim.

174. Vexatious conduct (*calumnia*) on the part of the plaintiff too is restrained, sometimes by the action of *calumnia*<sup>1</sup>, sometimes by a cross action, sometimes by an oath<sup>2</sup>, sometimes by a restipulation. 175. The action of *calumnia* is admitted in opposition to all actions whatever, and is for a tenth part of the matter in dispute; or when it is allowed against interdicts, for the fourth part. 176. It is in the defendant's power to elect whether he will reply with the action of *calumnia*, or require the oath "that the action is not brought vexatiously." 177. The cross action is applicable to certain special cases; for instance, to that of the *actio iniuriarum*<sup>3</sup>, and the proceedings taken against a woman when she is charged with having fraudulently transferred possession to another after having been put in possession *ventris nomine*<sup>4</sup>; so also to the case of a person bringing his action on the ground that although he had received from the Praetor

<sup>1</sup> See Sanders' notes on *Inst.* IV. 16. pr.

<sup>2</sup> Similar to that referred to in IV. 172.

<sup>3</sup> III. 224.

<sup>4</sup> This was when a woman on the death of her husband claimed

sion for a child of whom she said she was enceinte. In such a case, as we see, interim-possession of the property claimed was given to her. See D. 3. 2. 15-19, D. 25. 5, D. 25. 6, D. 29. 2. 30. 1.

sum ab alio quo admissum non esse. sed adversus iniuriarum quidem actionem decimae partis datur; adversus vero duas istas quintae. (178.) Severior autem coercitio est per contrarium iudicium: nam calumniae iudicio x. partis nemo damnatur, nisi qui intelligit non recte se agere, sed vexandi adversarii gratia actionem instituit, potiusque ex iudicis errore vel iniquitate victoriam sperat quam ex causa veritatis; calumnia enim in adfectu est, sicut furti crimen. contrario vero iudicio omnimodo damnatur actor, si causam non tenuerit, licet aliqua opinione inductus crediderit se recte agere. (179.) Utique autem ex quibus causis contrario iudicio agere potest, etiam calumniae iudicium locum habet: sed alterutro tantum iudicio agere permittitur. qua ratione si iusiurandum de calumnia exactum fuerit, quemadmodum calumniae iudicium non datur, ita et contrarium non dari debet. (180.) Restipulationis quoque poena ex certis causis fieri solet: et quemadmodum contrario

a grant of possession, his entry has been opposed by some one or other. When the action of *calumnia* is in reply to an *actio iniuriarum* it is granted for the tenth part (of the claim in that action), when it follows the two last-named it is for the fifth part. 178. The penalty involved in a cross-action is the more severe one, for in the *judicium calumniae* a man is never mulcted in the tenth unless he be aware that he is bringing his action improperly, and be taking proceedings for the mere purpose of annoying his opponent, expecting to succeed rather through the mistake or unfairness of the *iudex* than through the merits of his cause: for *calumnia* like *furtum* lies in intention<sup>1</sup>. In a cross-action, on the other hand, the plaintiff, if he be unsuccessful in his suit, is always mulcted, even though he were induced by some idea or other to believe that he was bringing his action properly. 179. Undoubtedly in all cases where we can proceed by cross-action, the *judicium calumniae* can also be employed: but we are allowed to use only one of the two. According to this principle, if the oath against vexatiousness have been required, the cross-action cannot be allowed, inasmuch as the *judicium calumniae* is not (allowed). 180. The restipulatory penalty is also one only applicable to certain special cases<sup>2</sup>: and just

<sup>1</sup> III. 197, 208.

<sup>2</sup> IV. 13. Cic. *pro Rosc. Com.* c.



iudicio omnimodo condemnatur actor, si causam non tenuerit, nec requiritur an scierit non recte se agere, ita etiam restipulationis poena omnimodo damnatur actor. (181.) *Sane si ab actore ea restipulationis poena petatur, ei neque calumniae iudicium opponitur, neque iurisiurandi religio adiungitur: nam contrarium iudicium in his causis locum non habere palam est.*

182. Quibusdam iudiciis damnati ignominiosi fiunt, velut furti, vi bonorum raptorum, iniuriarum; item *pro socio, fiduciae, tutelae, mandati, depositi*. sed furti aut vi bonorum raptorum aut iniuriarum non solum damnati notantur ignominia, sed etiam *facti*: idque ita in edicto Praetoris scriptum est, et recte: plurimum enim interest utrum ex delicto aliquis, an ex contractu debitor sit, et Praetor illa parte edicti id ipsum notat, nam con-

as in the cross-action the plaintiff<sup>1</sup> is in all cases condemned to pay when he has failed in the original suit, and the question whether he did or did not know that he was suing improperly is never raised, so in the case of the restipulatory penalty is he condemned to pay in every instance. 181. Clearly, if a restipulatory penalty be claimed from the plaintiff, no action of *calumnia* can be brought against him, nor can the obligation of an oath be laid upon him: for it is plain enough that there can in such cases be no cross action<sup>2</sup>.

182. In some actions those against whom a judgment is given are branded with infamy, for instance the actions for theft, robbery with violence, injuries, also those in respect of partnership, fiduciary engagement, guardianship, mandate, deposit. But not only those condemned for theft, robbery, or injury are branded with ignominy, but even those who have bought the plaintiff off<sup>3</sup>, and thus it is laid down, and very properly too, in the edict of the Praetor: for there is a considerable difference between the position of a debtor upon a delict and one upon a contract<sup>4</sup>, a point which the Praetor takes note of

<sup>1</sup> The plaintiff in the original action, i. e. the defendant in the cross-action.

<sup>2</sup> The meaning of this paragraph is very simple. We are told in § 174 that the *calumnia* of the plaintiff can be met in four different ways, we are now informed that the defendant

must select *one* of these remedies, and that he cannot employ first one and then another. The doctrine agrees with that in § 179.

<sup>3</sup> See D. 3. 2. 6. 3.

<sup>4</sup> The latter portion of the section is filled in according to Heffter's conjectural reading.

*tractus separavit a delictis. ceterum si quis alieno nomine convenitur, velut procuratorio, ab ignominia liber erit. idem est si quis fideiussorio nomine iudicio convenitur. etenim et hic pro alio damnatur.*

183. In summa sciendum est eum qui aliquem in ius vocare vult et cum eo agere, et eum qui vocatus est naturali ratione ac lege iustam personam habere debere. quare etiam sine permissu Praetoris nec liberis cum parentibus constituetur actio, nec patrono et liberto, si non impetrabitur venia edicti, et in eum qui adversus ea egerit poena pecuniaria statuitur. (184.) Quando autem in ius vocatus fuerit adversarius, ni eo die finitum fuerit negotium,

in the portion of the edict just alluded to<sup>1</sup>. For he has drawn a line of demarcation between contracts and delicts. Where, however, a person is sued in another's name, for instance, as his *procurator*, he is exempt from ignominy. The same rule applies to the case of a person sued as a *fidejussor*, because he too is condemned to pay on behalf of another.

183. In conclusion, be it known that both he who wishes to summon another into court and sue him and he who is so summoned ought upon principles of equity as well as law to have a *status* invested with full legal attributes<sup>2</sup>. Hence, therefore, without permission of the Praetor no action can be brought by children against their parents; nor between a patron and his *libertus* unless special exemption be granted them from the rule of the edict; and should any one act in contravention of these regulations a pecuniary penalty<sup>3</sup> is imposed on him. 184. When a defendant has been summoned to court, unless the business be concluded on the day of sum-

<sup>1</sup> The subject of *infamia* or *minia* is treated of in D. 3. 2. See especially 3. 2. 1, 3. 2. 4. 5, 3. 2. 6, and 3. 2. 7.

<sup>2</sup> *Naturalis ratio* here means equitable as opposed to civil law, civil law being denoted by the word *lex*. See II. 65, 66, 67 and D. 4. 5. 8. The phrase *personam habere* is identical with *personam aliquam sustinere, capere*, etc., which occur

in Cicero, e. g. in *Pro Sulla*, 3, *Pro Quinctio*, 13. The rule laid down in this section is approved of in D. 2. 4. 12. See also D. 2. 4. 1-4 and 23-25.

The section from this point to its conclusion is translated from Heffter's conjectural reading.

<sup>3</sup> The penalty was 5000 sesterces, IV. 46. Just. *Inst.* IV. 16. 3. See also D. 2. 4. 4.

vadimonium ei faciendum est, id est ut promittat se certo die sisti. (185.) Fiunt autem vadimonia quibusdam ex causis pura, id est sine satisfactione, quibusdam cum satisfactione, quibusdam iureiurando, quibusdam recuperatoribus suppositis, id est ut qui non *steterit*, is protinus a recuperatoribus in summam vadimonii condemnatur: eaque singula diligenter Praetoris edicto significantur. (186.) Et si quidem iudicati deensive agetur, tanti fiet vadimonium, quanti ea res erit; si vero ex ceteris causis, quanti actor iuraverit non *calumniae* causa postulare sibi vadimonium promitti, nec tamen *pluris quam partis dimidiae*, nec pluribus quam sestertium et milibus fit vadimonium. itaque si centum milium res erit, nec iudicati deensive agetur, non plus quam sestertium quinquaginta milium fit vadimonium. (187.) Quas autem personas sine permissu Praetoris impune in ius vocare non possumus, easdem nec vadimonio

mons, he must enter into a *vadimonium*, that is, he must promise that he will appear on a day fixed. 185. In some cases the *vadimonia* are simple, that is, without sureties, in some they are with sureties, in some they are with an oath, in some with *recuperatores* interposed, which means that if a man fail to make appearance he will at once be condemned by the *recuperatores* for the amount of his *vadimonium*: and each of these matters is carefully explained in the Praetor's edict. 186. If then the action be upon a judgment or for money laid down by a *sponsor*<sup>1</sup>, the amount of *vadimonium* will be the value of the matter in dispute: but if it be on other grounds, the *vadimonium* will be such amount as the plaintiff shall fix after having sworn that he does not demand a promise of *vadimonium* to himself with any vexatious object; but its amount cannot be fixed higher than half the value of the subject of the suit, or than 100,000 sesterces. If then the subject be worth 100,000 sesterces, and the action be not one on judgment or for money laid down by a *sponsor*, the *vadimonium* cannot exceed 50,000 sesterces. 187. All persons whose appearance in court we cannot legally compel without the Praetor's permission<sup>2</sup>, we are also unable to com-

<sup>1</sup> III. 115.<sup>2</sup> IV. 183.

invitas obligare nobis possumus, praeterquam si Praetor aditus permittit.

pel to furnish *vadimonium* to us against their will, save in cases where the Praetor allows them to be brought before him<sup>1</sup>.

<sup>1</sup> That is to say, in order to secure their attendance at the trial by means of a *vadimonium* the plaintiff must first obtain leave from the Praetor to summon them for the preliminary proceedings.

## APPENDIX



## APPENDIX.

### (A). On *Potestas*, *Dominium*, *Manus*, and *Mancipium*.

*Potestas* means primarily right or domination over oneself or something external to oneself. In many passages of the sources it is used as synonymous with *ius*, and as equivalent to full and complete ownership.

The only place in the fragments of the XII. Tables where the word occurs is the following: "Si furiosus est, adgnatorum gentiliumque in eo pecuniaque ejus potestas esto" (Tab. 5. l. 7); and what is there denoted by it is evidently a power of superintendence and direction. We may conclude then that *potestas* was not the archaic word expressing the combination of positive rights and authority possessed by the head of the household, the *paterfamilias*. Maine thinks that *manus* was the old word expressing this and all the other notions subsequently marked with the separate and distinctive appellations of *dominium*, *potestas*, *mancipium*, and *manus*. But whatever was the archaic term, and whether there was one at all or not, *potestas* in the classical jurists is the word used to express the rights and authority exercised by the *paterfamilias* over the persons of the *familia*, just as *dominium* denotes his power over the inanimate or unintelligent components of the same.

*Mancipium*, which originally means hand taking (*manu capere*), is in its technical sense connected with a particular form of transfer called *mancipatio*, and stands in the sources, 1st, for the *mancipatio* itself (see Gaius, IV. 131); 2nd, for the rights thereby acquired; 3rd, for the object of the *mancipatio*, the thing to be transferred; 4th, for a particular kind of transferable objects, viz. slaves, to whom it is applied, so says a law of the Digest (D. I. 5. 4. 3), because "ab hostibus manu capiuntur;" although the more probable reason for the application of the term is to be found in the fact that slaves were viewed by the Roman lawyers as mere things, and so capable of transfer from hand to hand.

The importance of the term *mancipium*, so far as regards the historical aspect of Roman law, lies in the fact that from its connection with the word *manus* we gather a correct idea of the ancient notion of property, which was in effect the dominion over those things only that could be and were actually transferred from hand to hand.

As *potestas* came gradually to bear a restricted meaning in the law sources, and instead of being a general term for authority of any kind began to signify authority over persons only, and those too such alone as were in the *familia* of the possessor of the *potestas*; so *mancipium* became a technical term implying the power exercised over free persons whose services had been transferred by *mancipatio*; and *manus*, originally almost identical with *mancipium*, was limited to the one case of power over a wife.

On the subject of *mancipium* read Mühlenbruch's Appendix on l. 12, in Heineccius' *Syntagma*, pp. 159, 160.



(B). On *Arrogation* and *Adoption*.

The process of *arrogatio* resembled the passing of a *lex*, and took place at the *Comitia Curiata*. Legislative sanction was required for so solemn an act as the absorption of the family of the *arrogatus* in that of the *arrogans* (see I. 107) for two reasons: firstly, because the maintenance of a family and its sacred rites was viewed as a matter of religion and as influencing the prosperity of the state; secondly, because the *populus* claimed a right of succession to all vacant inheritances as “*parens omnium*” (Tac. *Ann.* III. 28), and arrogation naturally prevented vacancies occurring.

This method of adoption *per populum* was practised long after the empire was established. In Cicero's time it seems to have been frequently employed, and in the *Pro Domo*, c. 29, we have a passage containing the form of words used: “Credo enim, quanquam in illâ adoptione legitime factum est nihil, tamen te esse interrogatum, Auctore esses, ut in te P. Fonteius vitae necisque potestatem haberet, ut in filio.” Augustus, Nero, and other emperors, adopted in this form, viz. by order of the *populus*; nor was it till after Galba's time that it fell into disuse, as is evident from the speech which Tacitus puts into that emperor's mouth: “Si te privatus lege curiata apud pontifices, ut moris est, adoptarem, &c.” (*Hist.* I. 15.)

Adoption, or rather arrogation, by imperial rescript afterwards replaced the older method. The reader desirous of further information on this topic, the principal interest of which lies in its relation to the history of social life in ancient Rome, is referred to Heineccius' *Syntagma*, I. XI. pp. 143—152, Mühlenbruch's edition, and Sandars' *Justinian*, pp. 114, 115.

(C). On *Tutors*.

Tutors may be thus tabulated according to their species:

- |      |                               |   |   |
|------|-------------------------------|---|---|
| I.   | Testamentarii                 | { | (α) Optivi, § 154.                            |
|      |                               | { | (β) Dativi, § 154.                            |
|      |                               |   | (γ) Agnati, § 155.                            |
| II.  | Legitimi ...                  | { | (δ) Patroni, § 165.                           |
|      |                               |   | (ε) Quasi-patroni, § 175.                     |
| III. | Fiduciarii ...                | { | (ζ) Manumissores liberarum personarum, § 166. |
|      |                               | { | (η) Liberi quasi-patronorum, § 175.           |
| IV.  | Cessicii (θ),                 |   | § 168.  |
| V.   | Dativi (a magistratibus dati) | { | (ι) Praetorii, §§ 176—184.                    |
|      |                               | { | (κ) Atiliani, §§ 185—187.                     |

*Tutela* was exercised over minors or women. Those under *tutela* were placed in that position because, either as a matter of fact or of implication of law, they were incapable of exercising the legal rights which appertained to them as persons *sui juris*. In Gaius' time the notion that women were incapable at any age of managing their affairs was exploded (§ 190), and therefore the tutor of a woman, in many cases, had to interpose his *auctoritas* at the woman's command, and not at his own discretion. (Ulpian, XI. 27.) In the case of a minor the tutor's power to compel either acts or forbearances was unlimited; an “*actio tutelae*”, however, to be brought by his ward on attaining puberty, hung over him, and constrained him to act for

## On Tutors.

the ward's benefit (§ 191). When the *tutela* was exercised over a woman for the benefit of tutor and ward at once, in the case, that is to say, of the two latter of the three classes of *tutela legitima* above, we are told that the tutor had great power to compel forbearances (§ 192), but we are not told whether he could insist on acts, *e. g.* whether he could compel the purchase of land, as well as stop the sale of land; but the absence of mention of this, the greater power of the two, would imply that he had not got it, as the tutor of a minor had. The *tutela legitima* of the *agnati* over women were abolished in Gaius' time, previously the same remarks would have applied to them.

A. *Tutores testamentarii* were allowed by the law of the Twelve Tables: "uti legassit super pecunia tutelave suae rei ita jus esto." Hence this class might be called *legitimi* equally with the succeeding, but to avoid confusion the two are marked by different appellations.

B. *Tutores legitimi* are of three kinds:—

I. The *agnati* of one to whom the *paterfamilias* had appointed no testamentary guardian. The clause of the Twelve Tables which authorized the *agnati* to act is lost, but Gaius is explicit in his statement that their authority is based on the Tables (§ 155).

II. The *patroni* and their children (§ 165); by implication arising from the wording of the Tables. The son very properly succeeds his father as tutor, since if there had been no manumission he would have succeeded him as *dominus*, and therefore he fairly inherits the rights reserved out of the *dominium*.

III. The manumittor of a free-born person, when that manumittor was the *paterfamilias* himself (§ 175). If, however, the manumittor were a stranger, he would not be a *tutor legitimus*, but only a *tutor fiduciarius* (§ 166) and again, the children of a *tutor legitimus* of this class, which we may call the class of *quasi-patroni*, would be *tutores fiducarii* (§ 175). The father is allowed to have *tutela legitima*, because when he manumits the son as a preliminary to emancipation by himself, he is regarded as retaining in some degree his *potestas* (§ 140), and although emancipation dissolves the *potestas*, yet the *tutela* is, in reference to the father's intent, allowed to be of the highest kind—*legitima*. When, however, the father is dead this reason no longer operates, and the *tutela* of the brother of the *emancipatus* is only *fiduciaria*; for at the father's death both sons had been in *potestas*, after the death each would have been independent of the other, and therefore although the *tutela* must be kept up (for the son of a manumittor succeeds to his father's position as *patronus* or *quasi-patronus*, and consequently to the tutorship attached to that character), yet the *tutela* is altered in kind to meet the equity of the case. Whether the *tutela* is of one character or the other is no matter of indifference if the manumitted person be a woman, for, as above observed, the coercive powers of a *tutor legitimus* were great, and those of a *tutor fiduciarius* nil.

C. *Tutores fiduciarii* are of two kinds:—

I. Manumittors of free persons manumitted to them by a parent or *coemptionator*. Such persons have only the tutorship of the nominal character, because when manumission is made to a stranger for purposes of manumission, the law implies a trust that the manumittor will not use his position for his own profit (§ 141).

II. Children of *quasi-patroni*, whose case we have discussed just above.

D. *Tutores cessicii*. This kind is fully explained in the text, and requires the less comment as it went out of use very soon after Gaius' time.

E. *Tutores dativi*:—

I. *Practorn*, given by the praetor for various reasons (§§ 176—184), and when given, supplanting for the time the authority of the tutor of one of the preceding classes,—deputy-tutors, in fact, for a longer or shorter time.

II. *Atilian*, tutors appointed by the magistrate in cases where a minor or woman has no tutor at all.

### (D). On Acquisition.

The various modes of acquisition recognized by the Roman Law are divided into two classes, (1) Natural, (2) Civil; the former existing in the jurisprudence of all nations, the latter peculiar to the Roman legal system.

These and their subdivisions may be thus tabulated.

See Halifax's *Analysis of the Civil Law*.

#### I. Natural modes of acquisition.

##### (a) Occupancy.

- (1) Of animals. II. 66, 67, 68.
- (2) Of property of the enemy. II. 69.
- (3) Of things found. Just. *Inst.* II. 1. 18 and 39.

##### (b) Accession.

###### (1) Natural.

- (a) The young of animals. Just. *Inst.* II. 1. 19 and 37.
- (β) Alluvion. II. 70.
- (γ) Islands rising in the sea or a river. II. 72.
- (δ) Channels deserted by a river. Just. *Inst.* II. 1. 23.

###### (2) Industrial.

- (a) Specification. II. 79.
- (β) Conjunction of solids. Just. *Inst.* II. 1. 26.
- (γ) Confusion of liquids. *Ibid.* II. 1. 27.
- (δ) Commixtion of solids. *Ibid.* II. 1. 28.
- (ε) Buildings. II. 73.
- Writing. II. 77.
- Painting. II. 78.

###### (3) Mixed.

- (a) Planting. II. 74.
- (β) Sowing. II. 75.
- (γ) *Perceptio fructuum*. Just. *Inst.* II. 1. 35, 36.

##### (c) Tradition (delivery). II. 65.

- (1) On sale. Just. *Inst.* II. 1. 41.
- (2) On gift. *Ibid.*

- : when a *querrela inofficiosa* is sustained. See Just. Inst. 11. 18.

## Appendix.

### (F). On the *Decurionatus*.

The *decuriones* were the members of the senate of a *municipium*, i. e. of a town which was allowed to manage its own internal affairs. Originally the *municipes* or burgesses, convened in their general assembly, seem to have held the sovereign power: they elected the magistrates (see Cic. *pro Cluentio*, 8) and they enacted the laws (Cic. *de Leg.* III. 16): but the power of the assembly gradually declined, and the senate usurped its functions, directly administering all business, instead of adopting and passing the matters sent up to it by the *municipes*. The senate and its members are denoted by different names at different periods of Roman history, originally *ordo decurionum* (for instance, in Macrobius, *Sat.* II. 3. 11, where there is an anecdote that Caesar found it more difficult to get a *decurionatus* at Pompeii than at Rome), then *ordo* simply, finally *curia*, and the members *curiales* or *decuriones*. During this last period the magistrates of a *municipium* were nominated by the *decuriones*, and the functions of government apportioned between the two. The first infringement on the rights of the *municipes* as a body may be referred to the time of Augustus, who ordered that the right of suffrage at elections should be confined to the *decuriones*: and from that time the name of *municipes*, originally applied to all the inhabitants, is confined by writers on the subject to the members of the senate or *curia*.

As the *decuriones* were thus invested with so large an amount of power and influence, it may be asked why in later times it was difficult to find men willing to become members of the corporation, and why had devices to be invented to keep up the numbers of the *curia*: for instance that of allowing legitimation to be effected by enrolment of an illegitimate son as a member of the *curia* (*per oblationem curiae*). The answer is that the absorption of all power by the emperors in later times rendered the office one of intolerable responsibility, and further that heavy fees attended the enrolment of a new member.

### (G). On *Caduca* and the *Lex Papia Poppaea*.

The *Lex Papia Poppaea* introduced important alterations into the law of accruals and lapses. Let us first consider the old law on the subject.

Previous to the *Lex*, legacies which utterly failed from the death or incapacity of the legatee, or from any original invalidity of the bequest *lapsed* to the inheritance, and so benefited the heir. But this rule did not immediately apply to co-legatees: these only lapsed if both or all the co-legatees were unable to take.

Hence if some of the co-legatees were able to take, there might be *accrual* instead of *lapse*. Thus

(1) If the joint-legacy had been given *disjunctim* (in which case the co-legatees were styled *re conjuncti*), there was no accrual, for each legatee had from the beginning a title to the whole thing:

(2) If it had been given *conjunctim*, (in which case the co-legatees were termed *re et verbis conjuncti*), accrual was generally allowed, i. e. the surviving legatee or legatees took the share of their deceased associate, the only exception being in a legacy by *damnation*, where there was a lapse (II. 205):

(3) If the joint legacy had been given with a specification of the shares to be enjoyed by each legatee, (in which case the co-legatees were said to be

## On the Classification of Legacies.

*rbis conjuncti*,) there was no accrual, but a lapse, on account of the ration of the interests *ab initio*.

The *Lex Papia Poppaea* swept away all these regulations and left the law thus: all inheritances and legacies to unmarried and childless persons were void and were termed *caduca*, (but *caelibes* by marrying within one hundred days could avoid the forfeiture; and in the case of *orbi* only one half the bequest was *caducum*, Ulp. XVII. 1, Gaus II. 286):

Legacies which would have lapsed or accrued by the civil law were put under the same rules and said to be *in causâ caduca*. These rules were that *caduca* should go;

(1) to co-legatees joined *re et verbis* or *verbis* and having children. (As we said above those joined *re* would of course get the full legacy from the universality of their original title and therefore wanted no help from the law): failing these, they went

(2) to the heirs who had children: failing these again

(3) to legatees generally (not *conjuncti*) who had children.

All the e rules were again abolished by Justinian, (see Code vi. 51. 11,) and the old regulations were restored almost exactly, but the exceptional law as to legacies by damnation was not re enacted.

Caracalla had previously abrogated the *Lex Papia Poppaea* and made *caduca* go to the *fiscus*.

## (II). On the Classification of Legacies.

The following table exhibits the resemblances and differences of the various forms of legacy: --

	I.	II.	III.	IV.
				1. <i>Per</i>
Form.	Direct beque to the	Simple charge upon the heir.	Charge upon the heir in a peculiar form.	Direct bequest to one of several joint-heirs.
Process for recovery.	Vindication.	Condictio.	Condictio.	Judicium t: hæc dae.
Subject.	Property <i>ex jure Quiritium</i> of the testator.	Anything whatever, whether belonging to the testator, the heir, or a stranger; in existence or future.	Property of the testator or the heir.	Property

	I.	II.	III.	IV.
	<i>Per Vindicationem.</i>	<i>Per Damnationem.</i>	<i>Sinendi modo.</i>	<i>Per Praeceptionem.</i>
Conjoint Legacy.	Shared equally: accrual allowed.	Shared equally: no accrual allowed, but lapse to the inheritance.	Shared equally: accrual allowed.	Shared equally: accrual allowed.
Disjoint Legacy.	Shared equally.	Paid in full to each legatee.	Paid in full to first claimant: whether to second also a disputed point.	Shared equally <sup>1</sup> .

### (I). On the *Classification of Obligations*.

Obligations according to the Roman law are divided into (A) Natural and (B) Civil.

A. Natural obligations again are divided into (a) those which the civil law absolutely reprobates (see Warnkoenig's *Commentaries*, Vol. II. p. 158), and (b) those on which an action cannot be grounded but which can be used as an exception or ground of defence: *nuda pacta*.

B. Civil obligations are also subdivided into (a) civil obligations in the strictest sense, i. e. obligations furnished with an action by the civil law, (β) praetorian obligations, which are enforced by an action granted by the later legislation of the Praetor's edict.

(a). Of these civil obligations in the strictest sense there are two subdivisions, viz. (I) those which were altogether unconnected with the *jus gentium* and based on the civil law only, *legibus constitutae*: (II) those recognized by the *jus gentium*, and received into and furnished with an action by the civil law, *jure civili comprobatae*.

Under (I) we may classify (1) obligations springing from contracts *stricti juris*, which were actionable because entered into with special forms which the civil law prescribed: (2) obligations by delict: (3) what were called *obligationes ex variis causarum figuris*, arising chiefly from quasi-contracts or quasi-delicts, but not entirely confined to these. And to these at a later period were added (4) two descriptions of pact (see A. b. above), viz. *Pacta adjecta* and *Pacta legitima*, an explanation of which will be found below.

Under (II) we may range contracts of the kinds styled real and consensual.

(β). The Praetorian obligations were chiefly those called *constitutum ius*, i. e. a promise to pay a debt already existing according to natural law, but not enforceable by action; for the exaction of which, after the promise had passed, the Praetor in his edict furnished an action: and *prae-arium*, a grant of the use of a thing during the pleasure of the grantor, who again could only recover possession by means of a remedy (the *interdictum de precario*) provided by the edict.

<sup>1</sup> The rules as to this kind of legacy are given according to Gaius and the Sabinians: the Proculians (see Ulpian, xxiv.

11) considered a legacy by identical with one by vindication



Dismissing these Praetorian obligations, we will briefly indicate the species included under the genera numbered I. and II. above :—

Contracts *stricti juris* (I. 1, above) were either *verbal* or *literal*. The *verbal* being the stipulations so fully described by Gaius (III. 92--127); the *literal* obligations being the *nomina*, *chirographae* and *syngraphae*, as to which he also says enough (III. 128--134) to render further particulars unnecessary in this place.

The obligations from delict (I. 2, above) are fourfold, as Gaius tells us (III. 182--225), arising either from *furtum*, *rapina*, *damnum injuriæ datum*, or *injuria*.

As to the *variae causarum figurae* (I. 3, above), Gaius says but little, and that little indirectly and inferentially (e.g. in III. 91). We stated above that these *figurae* included two important branches, quasi-contracts and quasi-delicts : of the former subdivision we may bring forward especially the instances of *Negotiorum gestio*, business transacted for a man without his knowledge or consent, whereby a jural relation arises, which is described in detail by Mackelley in his *Systema Juris Romani*, §§ 460--462; and *solutio indebiti*, touched upon by Gaius slightly, but as to which Mackelley also gives full information in §§ 468--470, and lastly, *communio incidens*, a community of interest cast upon two or more persons without agreement of their own, for which we shall again refer the reader to Mackelley, §§ 464--467.

The *quasi delicts* are chiefly injurious acts of slaves or descendants for which the master or ascendant is bound to make reparation, some of which are named by Justinian in *Inst.* IV. 5, 1 and 2; and the act of a *judex qui litem suam facit* (Gai. IV. 52) is another instance. Another example is that of a man who has left an obstacle on a high way, or kept some thing suspended over one, which by proving a nuisance or by falling on a passer-by or his property works him damage.

The other *figurae* are obligations arising from the contracts of our sons, slaves, and agents, remedied by the actions *ad quod juren* (IV. 70), *exercitoria* and *institoria* (IV. 71), *tributoria* (IV. 72), *de peculio et de in rem verso* (IV. 73), or from the delicts of our sons and slaves or mischief committed by our cattle, remedied by the actions *noxalis* and *de pauperie* (IV. 75--80 and *Just. Inst.* IV. 8 and 9).

We now need only specify the chief contracts falling under Class II. above, and the *facta* giving rise to an action, and our enumeration of obligations is completed.

Real contracts, then, are *mutuum*, a loan where the borrower has not to return the identical thing lent, but an equivalent : *commodatum*, a loan where the borrower has to return the identical thing he has received : *depositum*, a loan for the benefit of the lender, or in other words a deposit of a thing for the sake of custody; with which is classed *sequestratio*, the placing of a thing in the hands of some person till its ownership is decided by a suit : *pinus*, a deposit as a pledge. Besides these there are certain contracts, which for want of a more specific name are styled *innominati*, and by the Roman lawyers are ranked in four subdivisions, viz., *Do ut des*, *Do ut facias*, *Facio ut des*, *Facio ut facias*; and the first of which, though called innominate, has a name, *permutatio*.

Consensual contracts are *Emptio Venditio*, *Locatio Conductio*, *Societas* and *Mandatum*, treated of by Gaius (III. 135--162), *Emphyteusis*, or a lease perpetual on condition of the regular payment of a rent, and *Superficies*, a lease of a similar character, but referring only to the building on a particular plot of land, but not affecting the land, and therefore terminated by the destruction of the building.

The contracts described as real or consensual are *bonae fidei*, that is to say, the *judex* who has to decide cases arising out of them may entertain

equitable pleas or answers. So also are the quasi-contracts and quasi-delicts.

*Pacta adjecta* and *Pacta legitima* (see I. 4, above) still remain to be mentioned. The former are agreements attached to *bonae fidei* contracts, and regarded by the law of later times as forming part of the contract, so that on their breach an action may be brought. Examples are an agreement that on the purchaser selling again what he has bought, the vendor shall have a right of pre-emption, &c. &c. (see Mackeldey, § 419). *Pacta legitima* are of various kinds, but the chief are the *pactum donationis* and that *de dote constituenda*. These again are too minute in their nature to be discussed in an elementary treatise, and we refer the reader desirous of information to Mackeldey, §§ 420--428.

### (K). On the *Decemviri*, *Centumviri*, *Lex Pinaria*, *Lex Acbutia*, *Leges Juliae*.

#### A. The *Decemviri stilibus judicandis*.

From the time of the XII Tables *decemviri* seem always to have existed in the Roman state, a fact which is indicated by Livy (III. 55) in the words he quotes from a law of the consulship of Valerius and Horatius: "ut qui tribunis plebis aedilibus judicibus *decemviris* nocuisset, ejus caput Jovi sacrum esset, familia ad aedem Cereris Liberi Liberaeque venum iret." Livy tells us that the original Decemviri, by whom the XII Tables were drawn up, themselves exercised judicial functions "singuli d cimo quoque die," (III. 33). When the consular government was re-established a court of *decemviri* was still kept in existence, and, according to Heffter, had the cognizance of almost all suits up to the date of the institution of the Praetor's office (B.C. 367). Until that event Heffter also holds that there was no giving of a *judec*, except in cases where the law specially provided for suits being conducted *per judicis postulationem*: grounding his opinion on Tab. I. l. 7: "Ni pagunt, in comitio aut in foro ante meridiem causam conjeito, quom perorant ambo praesentes post meridiem praesenti stitem addicito:" so that the *decemviri* had what in later times was styled *cognitio extraordinaria* in all sacramentary cases.

#### B. The *Lex Pinaria*.

This *lex* enacted about B.C. 350, effected a great change in the functions of the *decemviri*. A large number of actions had already been withdrawn from their cognizance, and transferred to that of the Praetor; and possibly because this magistrate was now overburdened with business, the *Lex Pinaria* empowered him to appoint a *judec* from the number of the *decemviri*, such *judec* not receiving a general but a special commission, that is, one confined to the particular case entrusted to him. There is indeed a passage from Pomponius in the *Digest* (D. 1. 2. 2. 29) which seems to refer the institution of *decemviri* to the same period as that of the *quatuor viri virarum*, &c., the words being, "deinde quum esset necessarius magistratus qui hastae praeeset, Decemviri litibus judicandis sunt constituti. Eodem tempore et quatuor viri etc." But as we know from Livy that the office existed previously, we must admit that the strict meaning of *constituti* should not be pressed, but that we ought rather to understand that some new function was conferred on the *decemviri*; and *hastae* will then be interpreted as the sacramentary actions for which the *Lex Pinaria* authorized the Praetor to call in the *decemviri* as *judices*. This explanation will, however, necessitate our placing the *Lex Pinaria* in the year 308 B.C. instead of

350 B.C., because Pomponius says the *quatuorviri* were instituted at the same time as the *triumviri capitales*, and the date of their institution is B.C. 308; but, first, we are not bound to consider that Pomponius is accurate to a few years in his very sketchy account; and, second, even if he be, there is no very valid reason for the commonly-received opinion that B.C. 350 is the date of the Lex Pinaria.

C. *The Lex Aebutia.* Gaius says that by this law and the two Julian laws the *legis actiones* were abolished, save in two cases, viz. actions referring to *damnum infectum* and actions tried before the *centumviri*. Those who wish to know exactly how much was effected by the *Lex Aebutia* and the *Leges Juliae* respectively, should consult Heffter's *Observations*, pp. 18-41, a portion of his work too long for transcription here. The results he arrives at are these: the *Lex Aebutia* may be divided into two principal clauses; 1st that the *centumviri* should judge in all sacramentary cases of a private nature, save only that the cognizance of questions touching liberty or citizenship should be left to the *decemviri stitibus judicandis*<sup>1</sup>, 2nd that all other causes which had previously been sued out *per iudicis arbitrice postulationem* or *per condictionem* should thenceforth be matters of *formula*, the Praetor having the jurisdiction thereof and appointing a *iudex*, who must give a decision within eighteen months from his appointment.

D. *The Centumviri.* This college consisted of 105 members, three from each of the thirty-five tribes<sup>2</sup>, and Cicero gives a list, the concluding words of which imply that it is not an exhaustive one, of their functions: "jac-  
tare se in causis centumvitalibus, in quibus usucapionum, tutelarum, genti-  
litarum, agnationum, alluvionum, circumfluvionum, nexorum, mancipiorum,  
parietum, luminum, stillicidiorum, testamentorum, cacterarumque rerum  
innumerabilium iura versentur." (*De Orat.* I. 38.)

E. *The Leges Juliae.* In the reign of Augustus important changes in the constitution of the centumviral courts took place. The *decemviri stitibus judi-  
candis* had still some slight original and independent jurisdiction left to them,  
but the Julian laws gave them a new function, that of presidents of the court of  
the *centumviri*, an office previously held by ex quaestors. The number of  
the *centumviri* was at the same time or soon after increased to 180, and they  
were divided into two or four tribunals, (some think more,) which in some  
cases sat separately, although in others of more importance the whole body  
acted together as judges. Whether much alteration was made by the  
Julian laws in their cognizance is a disputed point: some jurists have held  
that they could no longer deal with *actiones in rem*, which thenceforth were  
all *per formulam*, others have denied this statement; but there is very little  
evidence either way.

F. *The Form of Process in a Centumviral Cause.* The plaintiff first  
made application to the Praetor Urbanus or Peregrinus<sup>3</sup>, (having previously  
given notice to his adversary of his intention to do so,) for leave to proceed  
before the *centumviri*. If leave were granted, formalities similar to those  
described by Gaius in IV. 16 were gone through, *sponsiones*, however, for-  
feitable to the opposing party, taking the place of the old *sacramenta*,  
forfeitable to the state. The *decemviri* then convened the *centumviri*, or  
those divisions of them who had to decide on the question, according to the  
nature of the case. The rest of the process presented no peculiar features.

<sup>1</sup> See Cic. *pro Caccina*, 33. *pro Domo*,

<sup>2</sup> See Festus, sub verb.

<sup>3</sup> Heffter maintains that ap-  
could in some cases be made to the Prae-  
tor Peregrinus. See *Obs.* p. 39.

(L). On the *Proceedings in a Roman Civil Action*.

In the present note it is proposed to describe the various steps of a Roman action at law from its commencement to its termination.

We shall, however, first briefly notice the nature and extent of the jurisdiction of those higher officials by whom all points of pleading and technical preliminaries were decided.

It is, of course, unnecessary to speak here of the early history of Roman actions, or to examine the historical account of the changes by which jurisdiction in civil suits was supposed to have passed from the kings (if it ever was in their hands) to the consuls.

It is sufficient to take up this narrative at the time when the Praetors were the supreme Judges, invested with that twofold legal authority which is described by the technical terms *jurisdictio* and *imperium*. (See III. 181 n.) Two functions were comprised in the *jurisdictio*, one that of issuing decrees, the other that of assigning a *judex* (*judicis datio*).

When therefore the litigants had made up their minds to settle their disputes by law, they were accustomed to appear before the Praetor in a place specially assigned for trials. In old times this place was always the *comitium*<sup>1</sup>: at a later period the *Comitium* or *Forum* was reserved for *Judicia Publica*, whilst private suits were tried under cover in the *Basilica*. If the Praetor heard the cause in his superior seat of justice, he was said to preside *pro tribunali*, if in his ordinary seat, he was said to try *de plano*<sup>2</sup>.

The applications for relief at his hands were of course much more unimportant and informal at the sittings *de plano* than at those *pro tribunali*, where all those cases were argued which required a special argument. Hence it became customary for the Praetor, whenever some very important business was brought before him *pro tribunali*, to obtain the assistance of a *consilium*, the members of which sat behind ready to instruct him when difficult points of law arose in the course of the hearing<sup>3</sup>. "Often," says Pliny<sup>4</sup>, "have I pleaded, often have I acted as *judex*, often have I sat in the *consilium*."

The Praetor's court was closed on certain days, for, as is well known, there were *dies fasti*, *dies nefasti* and *dies interdicti*<sup>5</sup>. "On the former days," says Varro, "the Praetor could deliver his opinions without offence, on the *dies nefasti*, on close days, the Praetor was forbidden to utter his solemn injunctions *Do, Dico, Addico*:" consequently on those days no suits could be heard. The business before the court was distributed methodically over the *dies fasti*; thus on one day *postulationes* only would be taken, on another *cognitiones*, on a third decrees, on a fourth manumissions, and so on, an arrangement perfectly familiar to the practising English lawyer, who takes care to provide himself with the cause lists of the courts he has to attend<sup>6</sup>.

From this short notice of the superior courts and their characteristics we proceed to describe the actual method in which suits were conducted.

<sup>1</sup> See Plautus, *Poenulus*, III. 6. 12. "cras mane quaeso in comitio estote obviam."

<sup>2</sup> Hence Martial's allusion, *Sedeas in alto tu licet tribunali Et e curuli jura gentibus reddas.*

*Epig.* XI. 98.

<sup>3</sup> Cf. Cic. *de Oratore*, I. 37. The jors of provinces were similarly assisted by a body of Jurisconsults called

assessors, cf. D. I. 22.

<sup>4</sup> *Epist.* I. 20.

<sup>5</sup> See *Dictionary of Greek and Antiquities*, sub verbo *Dies*, and Varro, *de Ling. Lat.* VI. 28—30. 53.

<sup>6</sup> The Praetors, be it noticed, used to go on circuits, for the despatch of business, to certain specified places, hence *Forum Claudu*, *Cornelu*, *Donutiu*, &c.

Before resorting to law it was usual to endeavour to bring about an amicable settlement of the matters of difference by means of the intervention of friends. If their efforts were unavailing, the dispute was referred to Court, and the first step in the suit was the process termed *In ius vocatio*. In old times this *In ius vocatio* was of a very primitive character. The plaintiff on meeting the defendant bade him follow him into court; should the defendant refuse or delay to obey the mandate, the plaintiff called on the bystanders to bear witness to what he was doing, touching them on the ear<sup>1</sup> as he did so, after which he could drag his opponent off to court in any way he pleased. In course of time this rough and ready form of summons was got rid of, and at length the method of direct application to the Praetor was adopted, by whom a fine was imposed in case his order for appearance were disobeyed. The defendant, if he obeyed the summons and made his appearance, was able to obtain an interim discharge, either by procuring some one to become surety for his further appearance<sup>2</sup>, or by entering into what was called a *transactio*, that is a settlement of all matters in dispute. Should neither of these courses have been adopted, on the defendant announcing his intention to fight the case the next step in the business was the *editio actionis*. This moved from the plaintiff, and was in effect the actual commencement of the case itself. By it the defendant was formally challenged, and upon it he might, or rather was obliged, either to accept service, or to ask for a short delay in order to consider as to the propriety of accepting. The plaintiff, however, might if he pleased declare his aim and object to the defendant at the time when the *vocatio in ius* was issued<sup>3</sup>, or after its issue he might informally and out of court state his demand to his opponent, or tell him the form of action he intended to adopt<sup>4</sup>. Whichever mode he did adopt, the result was that the presiding magistrate and the defendant learned from the plaintiff that he intended to "postulate<sup>5</sup>," i. e. make a formal demand of a *formula*.

No particular phraseology or formal language was imposed upon the plaintiff in the publication of the *editio*.

As the selection of the particular form of action was entirely in the plaintiff's power, he was permitted to vary the form at any time before the final settlement of the pleadings, (that is between the *actionis editio* and the *deductio in iudicium*) for "*edita actio speciem futurae litis demonstrat*" says the Code<sup>6</sup>.

Of course such dangers on the plaintiff's part were met on the defendant's side by applications for delay, and the costs consequent upon these delays were thrown on the plaintiff. Sometimes the form of action prayed for was inadmissible in itself, sometimes the mode in which it was presented to the court was objectionable: in either of these events the Praetor refused to allow it, and whether this refusal were immediately upon the *actionis editio* or at a later period, the Praetor was not bound to declare such refusal by a *decretum*, but could if he chose simply pay no attention to the application. Hence, during the régime of the *legis actiones* the importance of strict and precise compliance with the rules of pleading, for the consequence of ill-drawn or badly-worded pleading on the part of the

<sup>1</sup> See Horace, *Sat.* 1. 9. 74. and Plautus, *Curculio*, v. 2. 23.

<sup>2</sup> See D. 2. 15.

<sup>3</sup> See Plautus, *Peregr.* 4. 9. 8—10.

<sup>4</sup> Technically called *denuciatio* D. 5. 2. 7, and D. 5. 3. 20. 11.

The term *postulatio* embraced all applications for formulae to the Praetor. It frequently happened that the delivery of

the formulae depended upon long arguments in which the skill and knowledge in pleading of the advocates were fully called into play. These arguments always took place in the superior court, *in Jure* and *pro tribunali*. *Ante iudicium* (1. *Quero de constituendo ipso iudicio solet esse*).

<sup>6</sup> C. 2. 1. 3.

plaintiff was failure, or to use the technical phraseology, *causa cadebat*. During the formulary period there was not so much risk of this mishap, for the Praetor himself used then to mark the verbal mistakes and errors in the plaintiff's *intentio*, and neither was the issue of fact fixed, nor the case sent for trial to the *iudex*, till the formula was properly drawn. Thus time and opportunity were given by the court for the correction of all technical omissions and mistakes before trial. Still the plaintiff, even at this period of procedure<sup>1</sup>, did incur the danger we are speaking of, for the trial being at his risk and peril, if eventually it turned out that the formula adopted did not fit in with his cause of action, he failed in his suit.

It is clear then that up to this stage the chief, if not the only active part in the proceedings was played by the plaintiff, and that whilst it was open to the defendant to take advantage of all his opponent's mistakes, he himself was called upon to do nothing, so far as his defence was concerned, before the *radimonium* was settled.

These preliminaries therefore being completed, the plaintiff's next step was *radari rem*, that is, in a particular and set form of words to pray that the defendant might find sureties to give bail for his appearance in court on a fixed day, generally the day after that following the application. That this form taxed largely the skill and care of the juriconsults of the day is evidenced by Cicero's words<sup>2</sup>: "Caesar asserts that there is not one man out of the whole mass before him who can frame a *radimonium*." The form itself is lost<sup>3</sup>, we may, however, surmise something of its nature from a passage in the oration *Pro Quinctio*. It seems clear that in the *radimonium* were fixed the day and place<sup>4</sup> when and where the parties were to appear before the Praetor in order to have the formula drawn up<sup>5</sup>, that in cases where the trial was to take place out of Rome the name of the magistrate in the provinces who was to give the formula was inserted, and that where a defendant who was living in the provinces claimed a right of trial before a Roman tribunal the name of the magistrate in Rome was stated by whom the formula was to be drawn up.

Various other technicalities attached to the *radimonia*. Two or three only need be specified. In the first place, as we have seen, bail might be exacted upon entering into a *radimonium*; but it might also be entered into without any bail or surety, and then it was termed *purum*; again the defendant might be called upon to swear to the faithful discharge of his promise, or *recuperatores* might be named with authority to condemn the defendant in costs to the full amount of his *radimonium* in case of non-appearance<sup>6</sup>. If the defendant answered to his bail he was said *radimonium sistere*; if he forfeited his recognizances, *radimonium deserere*; if the day of appearance were put off, *radimonium differre* was the technical phrase<sup>7</sup>. The consequences that ensued upon the *radimonium* being entered into were as follows: where the two parties appeared in person upon the day fixed, the object of the *radimonium* being thus secured, the *radimonium* itself was at an end and the proceedings went on in the regular way, which will presently be described: if, however, one or the other of them failed

<sup>1</sup> Thus Cicero, "Ita jus civile habemus constitutum ut causa cadat is qui non quem admodum oportet egerit." *De Inventione*, II. 19. See also Quint. *Inst. Or.* III. 6. 19.

<sup>2</sup> *Ad Quinct. Frat.* II. 15.

<sup>3</sup> Unless the lines in the *curatio*, I. 3. 5, have preserved it.

<sup>4</sup> In the event of the venue not being

necessarily fixed by the circumstances of the case.

<sup>5</sup> Cic. *pro Quinct.* 7, *apud finem*, and Gaus, IV. 184.

<sup>6</sup> Gaus, IV. 185. The Praetor's edict made special provision for all these cases.

<sup>7</sup> So Juvenal, *Sat.* III. 213, "differit *radimonia* Praetor."

to appear when the Praetor directed their case to be called on (*citavit*), the result, in case the plaintiff were in fault, was that he lost his case, (*causa cadebat*;) but the judgment was not final and in bar of all further proceedings. In case the defendant were in fault, his *vadimonium* was said to be *desertum*, and the plaintiff was authorized to sue him or his bail (which he pleased) *ex stipulatu*, for the amount stated in the vadimonial formula. Another means of securing attendance in court was a *sponsio*, entered into by the parties themselves without the intervention of sureties; and then on default of appearance a *missio in possessionem* was granted. This was given by the Praetor's edict, and enabled the plaintiff to be put in possession of the defendant's goods<sup>1</sup>.

Such was the process by which care was taken on the one hand to prevent frivolous and vexatious actions, and on the other to bring the parties to joinder of issue, or to that stage where a formula could be granted. For this purpose the forms were these. The Praetor having taken his seat in court, ordered the list of all the actions that had been entered and demanded two days back to be gone through, and the parties to them to be called into court. His object in doing this was to dispose of the *vadimonia* and to fix the different *judicia*. The case, therefore, being called on, supposing both parties were ready, the defendant, in reply to the citation, said, "Where art thou who hast put me to my bail, where art thou who hast cited me: see here I am ready to meet thee; do thou on thy side be ready to meet me." The plaintiff to this replied, "Here I am:" then the defendant said, "What sayest thou?" The plaintiff rejoined, "I say that the goods which thou possessest are mine and that thou shouldest make transfer of them to me." This colloquy being ended, the next step was for the plaintiff to make his *postulatio* to the Praetor for a *formula* and a *iudex*. These the Praetor could refuse, in some cases at once, in others upon cause shown. Supposing he assented to the *postulatio*, he granted a formula, but first heard both parties upon the application. At this stage the defendant was allowed either to argue that there was no cause of action, or to urge the insertion of some particular plea; the plaintiff on the other hand was entitled to ask for a *iudicium purum*, that is, a simple issue without any special plea, or to press for a replication to such plea as was granted, and to this the defendant might rebut (*triplicare*) and the plaintiff sur-rebut (*quadriplicare*), and so on. These preliminary arguments took place *pro tribunali*, the technical term for them being *constitutio iudicis*<sup>2</sup>. On their conclusion the formula was settled, and the *postulatio iudicis* having been made, the final act followed by which an end was put to the pleadings, the issue of fact being drawn and sent in the formula to the *iudex* or to *arbitratores*. If the issue had proved to be one of law, the matter would have never gone to a *iudex* at all, but have been settled *in iure* by the Praetor. The formula itself and its component parts are so fully and clearly described in the text of Gaius that it is needless to do more than refer to that for explanation of them<sup>3</sup>.

We have now arrived at the period of the proceedings when the parties were in a position to have the real question between them settled; that is to say, when they were before a *iudex* whose business it was to try the point

<sup>1</sup> This *missio in possessionem* was granted against any one who was to blame for preventing a suit from going on regularly. Its consequences were so severe in their effect upon the defendant's property and character that Cicero denounced in strong language the hardship of granting

a *sponsio* in case of Quintus. See *Pro Quinto* 8, 11, and 27.

<sup>2</sup> See *Cic. Oratoriae Partitiones*, 28, "Ante iudicium de constituendo ipso iudicio sicut esse contentio," and *Cic. de Inv.* II. 19.

<sup>3</sup> iv



remitted to him in the formula<sup>1</sup>. A few words, then, upon the nature and extent of the jurisdiction of the *judex* will not be out of place. The *judex* was a private person, not a trained lawyer<sup>2</sup>; his position with reference to the parties was a combination of arbitrator and jurymen; arbitrator, because he was entrusted with what in effect was the settlement of the matter in dispute between the parties; jurymen, because his action was confined simply to announcing his decision. If he had been able to complete the inquiry by giving a decisive judgment and enforcing it himself, his powers would have been very similar to those of an English county court judge. These, however, were more limited. Yet, though he was bound by the terms of the formula to try the question of fact, he was not so completely confined to it as to be unable to examine and decide upon such matters of law as were incidentally connected therewith. To protect him against the chance of mistakes in law he was allowed to claim and receive the advice of the Praetor or Praeses<sup>3</sup>; and in later times, if not in the days of Cicero, he was also able to obtain advice from a *consilium* who sat on benches near him. (Aul. Gell. *Noct. Att.* XIV. c. 2.) And, further, his decisions upon legal points were subject to the control and review of the Praetor, who might annul the sentence, and either refuse to execute it or, if necessary, send it for a further hearing.

In the trial itself his authority was strictly confined to the facts specially laid before him; in other words, he had no power to travel out of the record and decide upon collateral matters of fact, at least in actions *stricti juris*, for he was able to add pleas in equitable actions (*actiones bonae fidei*). The *intentio* and the *condemnatio* were his guiding lights; from them he learned the real nature of the inquiry, and by them he was strictly limited. From the one he knew what the plaintiff was to establish; by means of the other he was at little or no difficulty in making his decision<sup>4</sup>.

The cause then was called on, and the parties were summoned into court, *in iudicium*. On their appearance, the oath of *calumnia* was administered to them<sup>5</sup>, and when that had been taken, the advocates (*patroni*) were expected to open the cases of their clients. This they did with a very short outline of the facts. After this brief narrative, called *causae collectio*<sup>6</sup>,

The matter was now *in iudicio*, as set to the previous enquiries, which *in iure*. Were it necessary to try to find corresponding English terms, one might apply those of "sittings at Nisi Prius and in Banco."

It is beyond the scope of this note to dwell at full length on the important subject of Roman Pleading. There are therefore many matters which cannot now be explained, such as the consequences resulting from the *litis contestatio*, the novation effected by the *litis contestatio* III. 176, 180, and D. 46. 2. 29, the plaintiff's power of interrogating *in iure*, not very unlike our own common law interrogatories, confessions and acknowledgments; the oath tendered by the parties each to the other before the Praetor, the *prima* and *secunda actio* and the *causae amplificatio*; the law terms and times of trial at Rome and in the Provinces, and other matters of a similar nature, which would fill the pages of a more exhaustive comment on the Roman Law than this as-  
to be.

<sup>1</sup> A list of *Judices* selected from the

body of *cives* was drawn up by each Praetor on the commencement of his year of office and entered in his *Album*. From this list the litigants made their own selection. Cf. *pro Cluentio*, 43. Strictly speaking, the plaintiff nominated the *Judex*, but the defendant's acceptance was necessary. Cic. *de Orat.* II. 70.

<sup>2</sup> This assistance was confined entirely to questions of law, for as to matters of fact, the *Judex* was to rely upon his own judgment and to decide "prout religio suggerit" D. 5. 1. 79. 1. The importance and varied work of the *judices* are evidenced by the fact that the title of a book of the *Digest*, containing upwards of 80 laws, is devoted to the *Judicia*, D. 4. 1.

<sup>3</sup> "Ultra id quod in iudicium deductum est excedere potestas judicis non potest." D. 10. 3. 18.

<sup>4</sup> IV. 172, 176. The *judex* himself, on taking his seat, had to swear to do his duty faithfully and legally. This he did in a set form of words, and with his hand on the altar (the *puteal Libonis*).

<sup>5</sup> IV. 15. In the *Digest* it is called *causae collectio*. D. 50. 17. 1.



the evidence was adduced, and at the close of the evidence each advocate made a second speech, urging all that could be said in his client's favour and commenting on the evidence that had been brought forward. The time occupied by these speeches was not left to the discretion of the advocates, but limited to so many *clepsydrae*<sup>1</sup>. When the cause had thus been fairly gone through, the last stage in the *judicium* was the sentence. Here the *judex* was, as we have mentioned above, strictly limited by the formula, and if he travelled out of it, and either assumed to decide upon what was not before him or touched upon collateral matter, he was said *litē suam facere*<sup>2</sup>, and was liable to a penalty for his mistake. With the announcement of his sentence his power and authority in the suit ended. The execution of the sentence rested with the Praetor, but a delay of 30 days was allowed between the sentence and its execution. When that time had expired the sentence became what was called a *res judicata*, and upon it the successful party could bring his action for twice the amount of money awarded by the *judex*, and could also obtain a *manus in possessionem* until his opponent's property was sold to pay the judgment debt. All this part of the cause was in the hands of the Praetor, whose *imperium* enabled him to direct proceedings against the party refusing to comply with the decision of

(M). On the *Legis Actio per Judicis Po*

The strict nature of the *actio sacramenti* and the serious risk attaching to it of losing the amount deposited by way of *sacramentum* must have led to devices for withdrawing the settlement of litigious matters from that action and getting them tried in a less strict form, in fact, to the introduction of a process in which equitable constructions might be permitted. It is here then that we may find the germ of those equitable actions that under the name of *actiones bonae fidei* formed so important and valuable an adjunct to the Roman system of procedure.

That the custom of demanding a *judex* was a very ancient one even in Cicero's time we learn from a passage in the *de Officiis* (III. 10), where he speaks of it as "that excellent custom handed down from the practice of our forefathers."

Various well established facts show not only the early efforts made to mitigate the severity of the old common law forms by equitable expedients, but the direction that those efforts took, viz. the withdrawal of suits from the common law judges and from the trammels of common-law forms.

Hence we may reasonably conclude in the first place, that all actions which might by any possibility be treated equitably were allowed to be heard by a *judex* or an *arbitrator*, and next with equal reason infer that all such actions as would be settled in a clearer and safer manner by some process not so narrow or so unsuited to the question at issue as that of the *actio sacramenti*, such as suits about boundaries<sup>3</sup>, about injuries caused by rain-falls and waterflows, all matters requiring technical knowledge and skilled witnesses, or, as in the case of the *actio familiae erciscundae*, careful and detailed treatment, and all actions requiring an adjustment and rateable allotment of claim, or an equitable division of damages and interest instead of an assignment of the thing itself, were referred to a *judex*, withdrawn from the sacramental process and handed over to that called *judicis postulatio*. See Cic. *de Leg.* III. 21, D. 43. 8. 5, D. 39. 3. 24, D. 10. 2. 1.

<sup>1</sup> *Ep.* II. 11, IV. 9, VI. 2.  
<sup>2</sup> IV. 52.

<sup>3</sup> Cic. *de Legib.* I. 21 D. 43. 8. 5.  
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